IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT, IN
AND FOR DUVAL COUNTY, FLORIDA

GENERAL JURISDICTION

CASE NO 95-00934-CA

DIVISION CV B

GRADY CARTER and
MILDRED CARTER,

Plaintiffs,

vs.

BROWN & WILLIAMSON TOBACCO
CORPORATION as successor by
merger to THE AMERICAN TOBACCO
COMPANY

Defendant.

PROCEEDINGS

Tuesday, July 23, 1996

- - -

VOLUME II
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PROCEEDINGS

Tuesday, July 23, 1996 1 20 p m

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(Present for this hearing in chambers are J W Prichard, Jr , Robert B Parrish, Gregory H Maxwell, Bill Forte, Jack Ludeke, Robin Sieron, Hal McClure, June Bell, Lavonia Freeland Paul Ivice, Britt Beasley and John Kroll)

THE COURT Good afternoon The lawyers tell judges a lot and judges need to learn to listen to lawyers, I guess, as a part of my job They forewarned me that the media might be a problem, and as it turns out, I discounted their comments out of hand -- and actually I don't think my discounting was inappropriate because, as I've overheard your discussions as we approached this trial, it sounds like you-all have resolved whatever difference you may have had

Your interest has caused me to turn my attention to the rules of judicial administration that govern media in the courtrooms. Our courtrooms, of course, are public forums and your access is assured subject to certain restrictions that are designed to maintain decorum and orderly procedures.

With that in mind, I'm going to distribute to each of you here, who I'll ask to identify yourselves for the record, those rules, an interesting provision of which I was unaware of until recently of which I have the authority to eject contesting media, so that if you-all don't basically agree, it means nobody gets to play, which I guess is probably a reasonable way of resolving the conflict

But with that, let me begin with you, sir If you would, tell me who you are and your media affiliation

MR LUDEKE My name is Jack Ludeke I'm with The Florida Times Union

MR FORTE My name is Bill Forte I'm the bailiff for the trial

MS SIERON Robin Sieron with WJXT

MR McCLURE Hal McClure, WJXT

MS BELL June Bell, Florida Times Union

MS FREELAND Lavonia Freeland, intern, WJKS

MR IVICE I'm Paul Ivice with The Daily Record

MR BEASLEY Britt Beasley, court administrator

THE COURT Mr Forte, could you go to the courtroom and ask John Kroll from Court TV to join us He's the gentleman that was busily taping and placing equipment in the courtroom

MR FORTE Yes, sir

THE COURT While we are waiting on him, let me ask you if you could pass those around the room for me

THE COURT Since we have everybody from the printed media here, Jack, is it my understanding that you're going to be the still photographer in the courtroom?

MR LUDEKE Yes, sir

THE COURT And, Paul, is that your understanding, as well?

MR IVICE I accept that, as long as we agree on when we can get multiple photos to chose from within a reasonable time and manner. The last time we did this we ended up with one picture which we ended up not using I guess there was only one shot to be taken Our photographer did get in afterwards and did a shot that we used But in this situation I'm not sure this is possible

MR LUDEKE As far as what you need in hand, we now have an electronic darkroom so we don't

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make prints. We can produce a print out of the Kodak printer off of a digital image. If your people come in, we can look at the negatives together and we can scan what they want into the machine and print them something out Is that suitable?

MR IVICE I think so or else maybe just select the three best that you're not using, and we'll pick those up I don't know as far as .

THE COURT Well, let me make sure I understand

MR IVICE In this case maybe we'll be able to come over when you're doing that.

MR LUDEKE I think we can work it out

THE COURT I can't dissent to the particulars, but what I do want to get is an assurance that any photograph that you take you will have reasonable and timely access to it

MR LUDEKE Yes, sir, I believe that that can be done

MR IVICE I think we will be able to work it out I know people over there and they were cooperative the last time when it was more of a test than anything to do that And they did cooperate, so I don't think it should be a problem I mean, we

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do have later deadlines than they do, so I don't think it should be a problem

THE COURT Great

Broadcast media Mr Kroll, you joined us a little late I introduced everyone here I don't know that they know you I've only recently met you This is John Kroll You're with Court TV Actually you're an agent of Court TV I understand you're a local contractor

MR KROLL Yes

THE COURT Have you gotten your equipment situated satisfactorily?

MR KROLL Yes, sir, we're all set up and ready to go

THE COURT Is there an agreement between you and the various other broadcast media that are interested with regard to access to the --

MR. KROLL The ones that have approached me, yes, sir

MS SIERON The only concern I just wanted to mention -- you mentioned an isolated shot I am going to need a shot of the judge, a shot of the --

MR. KROLL I'm sure I will get some of that in there.

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MS SIERON As long as we're going to get that. I have told Channel 17 that I'll give them a dub of what we report.

MR KROLL I'm only going to do what I feel is necessary, and I'm sure I'll have closeups of everybody

MR BEASLEY Except for the jurors' faces

MR KROLL Except for the jurors' faces.

THE COURT Okay Jack, do you understand as well that I do not think that the jurors' faces should be photographed?

MR LUDEKE Yes, sir

THE COURT Unless the attorneys have some objection to that My thought, and I haven't discussed this with the jurors, is that they have rights of privacy that we have not infringed upon by their involvement in this case And that absent their consent, which I haven't had time to seek, nor am I inclined to seek, that their faces should not be broadcast either in a broadcast media or printed media Is that understood, Jack?

MR LUDEKE Yes, sir

THE COURT John?

MR KROLL I'm sorry, Your Honor I was

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reading --

THE COURT No jurors' faces are to be recorded Do you understand that?

MR KROLL Yes, sir

THE COURT I've given you -- I don't think you were here earlier -- and charging you with the knowledge of these rules that govern the proceedings, as are all of the persons here who have had copies distributed to them

The main thing is not to be disruptive, to be as unobtrusive as you can, and I know those of you that have done this before are aware of that There is some prohibition against movement during the course of the proceedings

Jack, have you done this before?

MR LUDEKE Yes, sir.

THE COURT So I don't expect to see you wondering around the courtroom. Actually as we're going to be set up today, I would suspect that your best camera angle -- I don't pretend to be a journalist, a photo journalist at all -- but it may be as you enter the courtroom to the left, because the attorneys that will be arguing will be facing the jury

And that's all that's going to happen

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today is the argument of the attorneys, so there won't be any witnesses. And there is a screen placed in the courtroom, if you've had a chance to see it. It's going to block a major portion of what would otherwise would be a field or a view for you So you need to make a decision about where you're going to be and then remain there

MR LUDEKE If I'm shooting from -- as you enter the courtroom from the right-hand corner of the courtroom, in order to be able to see the plaintiff and the lawyer at the table and then perhaps getting -- the lawyers arguing the case in front of the jury sometimes turn to the side If the jury is out of focus from that angle but still visible, is that a problem, if they're not identifiable?

THE COURT So long as they're not identifiable, I don't have a problem with it And if you have any question about whether they are identifiable, you need to ask me

MR LUDEKE Yes, sir, I understand

MR IVICE Now, I assume that for the most part we're not going to have a problem with both of us seeking photos except openings, closings and possibly the verdict, and that during the

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evidence phase of the trial we'll either wait until the other one is done and not stand there for a long time so that during other phases of the trial we'll get our own pictures

MR LUDEKE We can work that out later, but I think that we can --

MR IVICE I mean, generally that you're not going to be shooting on a daily basis or other than the very highest points as I described, right?

MR McCLURE Yes

MR IVICE The only other issue I wanted to raise is the possibility of getting reserved seating for the media This would avoid possibly any other problems I know while we've been sitting in here all the other people monitoring the trial are filling up all the seats so the courtroom is now full

THE COURT Completely?

UNIDENTIFIED SPEAKER Yes, pretty much so.

THE COURT Well, I'm going to make room for you today, and I'll address the concern tomorrow about maybe reserving a seat for you. But I'll see that you get in today. Actually, I guess, Jack, you're the only one that needs to be there Well,

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that may not be true. I don't know whether the other reporters had planned to attend.

Mr McCLURE I don't need to be in the courtroom I'll set it up for Robin and I'll leave.

THE COURT There may be some room on the left side of the courtroom as you face the exit. So if necessary I'll place some chairs over there for any of you that don't have seats, unless that's objectionable to counsel

MR PRICHARD I'm only concerned about not distracting the jury and this Court from doing what they need to do, and creating a circus inside of the bar is a good example It's a very small courtroom, as Your Honor is well aware, and I'm very concerned about that

I'm also concerned that movement -- individuals slipping out of the courtroom all the time in the back, no problem But movement during the examination, direct or cross of a particular witness, those kinds of things can be very distracting and detract from the process I would suggest or recommend to the Court that the setups for the cameras that the agreed parties wish to implement be reviewed by the Court prior to the jury coming in the courtroom so that any difficulties can

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be ironed out at that time

THE COURT I will do that today I think I happened to be in place when Mr Kroll was setting up his equipment and setting out some needs that we had that will probably satisfy your concerns today But I will make a point of doing that every day

As Mr Prichard has indicated, movement, particularly if it happens that you are seated inside of the bar, is extraordinarily distracting and should be kept to an absolute minimum Movement outside of the bar is equally distracting but not as so, at least not quite as distracting But I'm going to discourage it, and I am not going to hesitate to announce when I believe that you are interfering with the proceedings And I will expect Mr Forte, our bailiff who is here today, to be diligent and vigilant to our concerns

Anything else that I need to take up with the media from the defense?

MR PRICHARD Your Honor, this is probably preaching to the choir I'm not sure that this isn't well-known This is not a sequestered jury, as you know, and the jurors are under strict charge by Your Honor, as is always the case, not to discuss this case with anyone

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And I would think that -- I don't know this group here -- that walking up to someone on their way out of the courtroom at the end of the day or on a lunch break and shoving a microphone in their face or whatever it might be, for a juror could be particularly intimidating And I think they would be fleeing back to the courtroom to report to Your Honor

I'm not suggesting that that's what would be done But I'm very concerned that the jurors not get any more of a sense of fear that could be caused by a circus-type arrangement or any type of intimidation by the power of the press just because of the fact that all of a sudden it's big news or not And cognizant of Your Honor ruling to the jury and your instructions to them, I would hope that our folks here be mindful of that

MR MAXWELL On behalf of my clients, Your Honor, I wish to share Mr Prichard's concern

THE COURT I'm sure that all our media representatives here heard the concerns They are the Court's concerns, as well I can't emphasis enough the need for us to be orderly and respectful and quiet

MS BELL I just wanted -- I'm with the

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Times-Union and want to emphasize that we don't talk to jurors during the trial We make sure that when we are discussing the case in the halls that there are no jurors We're very sensitive to your concerns

MR IVICE We know the rules

MR PRICHARD I assumed you did but

THE COURT We're making a record of your knowing the rules

Anything else? Very good

I need to see the lawyers, but the balance of you are excused.

Mr Forte, if there is a problem with seating, if you could try to reasonably accommodate those people who are the media here.

MR FORTE I have a few extra chairs in the jury room, but they're kind of bulky and they take up a lot of space

THE COURT Don't take them out, but see what you can do

(Discussion off record)

THE COURT I needed to bring to your attention via Mr. Forte, our bailiff, that juror No. 7, Richard Prisock -- do you have him in mind which one he is?

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MR PRICHARD Yes

MR MAXWELL Yes.

THE COURT Has expressed some concerns about missing work and the juror fee that's paid and economic hardship that occasions it or is likely to occasion his service on this jury

My thought is he had ample opportunity to express his concerns during the voir dire, and that unless he insists on an audience with me or if you-all have an indication if he's inappropriate for some other reason or problematic, bring it to my attention But I felt compelled to bring it to your attention

MR PRICHARD Your Honor, I would certainly share your view on that, Your Honor, in terms of the ample opportunity under the questioning by both sides to come forward with any concerns they might have about a two-week trial The dynamic composition of the jury has been set certainly with Mr Prisock as a part of that

I realize that an unhappy camper is sometimes a devastating force on the jury I just don't know what you can do at this point other than to require him to remain on We would object to removing him from the jury at this point without the

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opportunity then to assess the remaining composition of the jury as it is

This isn't the typical excuse that you get when a juror falls ill and has some type of emergency that requires the substitution of an alternate juror He hasn't even heard the first piece of evidence and he's already trying to leave Had we known that, it very well may have affected both sides in their approach to the composition of the jury, the exercise of strikes, and so on

I'm very concerned that taints the process, but it does -- the timing of it would really cast serious doubt on the fairness that we afford to the parties with this jury

I've never had this happen before. I've had them get sick or the fourth day all of a sudden the baby is ill or they've had a wreck. But I've never had it where before the first piece of evidence is heard after a day and half of voir dire where a juror all of a sudden gets cold feet because of his -- I'm not criticizing his concerns.

My position, Your Honor, would be that he remain on the jury unless Your Honor decides otherwise

MR MAXWELL Well, I'm likewise

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concerned. Frankly, I would like to see him replaced right now, but I recognize that perhaps that's premature. I suppose I would like to reserve my right to request that he be replaced with an alternate if there is any further indication from him of any sort of thing that might indicate, you know, a comment made to the bailiff or complaining to the bailiff that would indicate that he is just not going to be paying attention to the evidence or that he is somehow disgruntled and that could impact on his decision-making process

That's basically what I feel now And we may have to explore this later Inasmuch as we've got a jury with two alternates now, I suppose that certainly could finish today and -- I guess one thing I need to ask the Court is, will the bailiff be making any response to him or will he expect a response from Your Honor?

THE COURT I don't know how to answer that question I probably need to talk with Mr Forte, our bailiff, a little more to find out the extent of the concern that was expressed I took it that it was a passing concern at this point and almost a gratuitous comment as opposed to a vigorous complaint I'll inquire more about it and

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will likely do it in your presence so that you can be better informed about the extent of the problem

MR PRICHARD Your Honor, and I would certainly request that any interview of the jurors sitting by Your Honor that both parties be there

MR MAXWELL Certainly

MR PRICHARD I didn't mean to suggest otherwise We can go off the record for a second

(Discussion off record)

THE COURT Part of the reason -- this needs to be on the record

If Mr Forte has entertained a number of complaints and comments from jurors, it may be because my direction to them was that if they encountered violations of the rule that they bring it to the bailiff's attention So I don't know that he has done anything extraordinary And then we've had a number of people here for a number of hours, so I don't think that the comments he's received have been extraordinary I guess they've been extraordinary in character in some ways.

But I will revisit with Mr Prisock probably at the end of the day the question of the extent of the problem as relayed to me from Mr Forte when you-all are present, and then we'll

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make some decisions about whether we should inquire of him further

MR MAXWELL Your Honor, just for the record, I want to make sure that I establish a clear record that we reserve our right to move to strike him subject to Your Honor's further investigation

THE COURT Okay

I'd like for you to take a moment before we bring the jury in to examine the courtroom with regard to suitability I want to make sure all of the cords are out of the way, that everything is as convenient for you as necessary

MR PRICHARD I appreciate that, Judge I think you've probably already done more to accommodate them than the law requires I think that the squabbling that was going on, the negotiations, they should have done before they troubled this Court with that But the first time, we'll kind of work our way through it, and I think you really did demonstrate remarkable forbearing with these folks

MR PARRISH I've got a petty audiovisual problem It would be helpful to us We had our video set up and Woody had to borrow the cord to use it for his thing So if between the two openings if

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we could have --

THE COURT A few minutes?

MR PARRISH I don't know if it justifies excusing the jury, but just a few moments to make the audiovisual switch It may be a break point I don't know

THE COURT If you-all are talking about arguing for 45 minutes to an hour, I'd probably take a ten-minute break in between

MR PARRISH That would be good I hate to bother you with that kind of detail

(Hearing adjourned at 1 45 p m)

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THE BAILIFF All rise This court is again in session Be seated, please

THE COURT Let me see counsel at side bar for a moment, please.

(Side-bar conference held; jury not present)

THE COURT Mr. Prichard?

MR PRICHARD Yes, Your Honor. I know you called us up here. We have a matter to take up before the jury is brought back in.

First of all, counsel and I have looked at the camera setup Certainly just sitting there it

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looks to be okay. We haven't heard it operate yet nor observed the cameraman So from the defendant's standpoint, despite the fact that I'm concerned about prejudice, I think his setup, given this courtroom, appears to be unobtrusive at this point.

THE COURT It appears to be?

MR PRICHARD Unobstrusive at this point -- as it can be

Secondly, Your Honor, we have a matter to bring up that I think --

MR SHEFFLER Your Honor, I believe that counsel for plaintiff intends to make reference and use documents from the Brown & Williamson collection that we've been arguing about last week We would like to renew our objections to the use of such documents and especially to the use of any such documents that may be covered by attorney/client or work product protection at this time

THE COURT All right

Do you want to be heard on that, Mr Wilner?

MR WILNER Your Honor, we furnished the four documents that we intended to mention to counsel and showed him the excerpts that we intended to read

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THE COURT Well, my instruction to the jury that what the attorneys say is not evidence, I think, will at least provide the protection that you need, Mr Sheffler, for any objections that may be made to the introduction of any evidence or attempted introduction of evidence when it's offered

So to the extent that you renewed your motion, I am going to deny it at this time.

Is there anything else?

MR SHEFFLER One more thing, Your Honor, just as a matter of housekeeping After the plaintiffs' opening, could we take a brief break to reassemble?

THE COURT Sure Yes

MR. PRICHARD We discussed that

THE COURT Are you-all comfortable with the audiovisual equipment? I mean, is everything satisfactory, at least to the extent that it's not going to be distracting, with the exception of what you had mentioned about the camera rolling. I may ask him to turn it on before the jury comes in, just to see whether it sounds like a lawn mower or not.

MR. PRICHARD Good idea.

THE COURT Other than that, though, is

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everything okay?

MR WILNER Yes, sir.

MR. SHEFFLER Okay.

MR PRICHARD This is something that counsel and I have discussed, and I think we'll be able to reach an accommodation after opening But we have objected to Mr Acosta and I believe Ms. -- Is it Ginny?

MR MAXWELL Steiger

MR PRICHARD From sitting behind us on our side of the table, not because -- it is a crowded courtroom, but we can't observe them during the course of deliberations But the jury can I'm very concerned -- it also makes me a little uneasy to have the opposition behind me

THE COURT Well, Mr Riley and Mr Sheffler have your back, so to speak. They can keep an eye on the expressions

MR PRICHARD I think it looks kind of silly, Your Honor, to have one of our lawyers turn around with their back to the jury, looking at two people behind them

THE COURT Well, if he turns his chair to the side, he will be able to keep an eye on them I'll instruct them not to make any noticeable facial

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expressions

MR SHEFFLER All right, I'd appreciate that

MR PRICHARD Thank you very much, Your Honor

(Side-bar conference concluded)

THE COURT Mr Kroll, I have some concerns, as do the attorneys, about the noise of your equipment. Is it operating now?

MR KROLL Yes, sir

THE COURT So that's the noise level we should anticipate hearing during the course of the trial?

MR KROLL Yes, sir

MR WILNER Sounds fine to me

MR. PRICHARD I'm not sure, are those the microphones up on the pedestal?

MR. KROLL Yes

MR PRICHARD I think it's very critical, Your Honor, that any side-bar situations can be conducted outside of the hearing of the jury

MR KROLL I can remove it, Your Honor.

THE COURT Mr. Kroll has been given a copy of the rules of judicial administration

MR. PRICHARD He hasn't had a chance to

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read it
MR KROLL I haven't had a chance to read it
THE COURT Mr. Prichard raises a good point. Side-bar conferences, by rule, are private, that is, the media does not have access to them So to the extent that that microphone might pick up discussions that occur between the attorneys and myself at the bench, you need to see that it doesn't, which may mean disconnect it when that occurs, unless you --
MR KROLL It's not necessary, Your Honor
THE COURT Very good
Anything else, Mr Prichard?
MR PRICHARD Not at this time, Your Honor
THE COURT Mr Wilner?
MR WILNER Nothing, Your Honor
MR KROLL Your Honor, one last thing I will be changing tapes about every 30 minutes I'm just going to let them roll through and I'll do it as quietly as possible, but there will be some noise involved with that
THE COURT All right

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Mr Forte, bring the jury in, please
(Jury present, 1 55 p m)
THE COURT Have a seat, please
Now, ladies and gentlemen of the jury, you need to know that everyone in this courtroom, with the exception of the Court, out of tradition and formality rises out of respect to you It's not necessary for you to remain standing once you enter the courtroom, even though everyone else might be So please feel free to come in when you're summoned and have a seat in your respective places
You have now been sworn as a jury to try this case This is a civil case involving a disputed claim or claims between the parties Those claims and other matters will be explained to you later. By your verdicts you will decide the disputed issues of fact. I will decide the issues and questions of law that arise during the trial And before you retire to deliberate at the close of trial, I will instruct you on the law that you are to follow and apply in reaching your verdicts.
In other words, it is your responsibility to determine the facts and to apply the law to those facts. Thus, the function of the jury and the function of the judge are well-defined, and they do

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not overlap.
This is one of the fundamental principles of our system of justice. Before proceeding further, it will be helpful for you to understand how a trial is conducted
In a few moments the attorneys for the parties will have an opportunity to make opening statements in which they may explain to you the issues in the case and summarize the facts they expect the evidence will show
Following the opening statements, witnesses will be called to testify under oath. They will be examined and cross-examined by the attorneys Documents and other exhibits also may be received as evidence
After all the evidence has been received, the attorneys will have again an opportunity to address you and to make their final arguments
The statements that the attorneys now make and the arguments that they later make are not to be considered by you either as evidence in the case or as your instruction on the law Nevertheless, these statements and arguments are intended to help you properly understand the issues, the evidence and the applicable law So you should give them your close

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attention
Following the final arguments by the attorneys, I will instruct you on the law
You should give careful attention to the testimony and other evidence as it is received and presented for your consideration But you should not form or express any opinion about the case until you have received all the evidence, the arguments of the attorneys and the instructions on the law from me.
In other words, you should not form or express any opinion about the case until you are retired to the jury room to consider your verdicts after having heard all of these matters
The case must be tried or heard by you only on the evidence presented during the trial in your presence and in the presence of the attorneys and myself You must not conduct any investigation on your own. Accordingly, you must not visit any of the places described in the evidence or the scene of the occurrence that is the subject of the trial unless I direct you to view the scene
Also you must avoid reading newspaper headlines and articles relating to this case and trial You must also avoid seeing or hearing

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television and radio comments or accounts of this trial while it is in progress

The attorneys are trained in the rules of evidence and trial procedure and it is their duty to make all objections they feel are proper When a lawyer makes an objection, I will either overrule or sustain the objection If I overrule an objection to a question, the witness will answer the question When I sustain or uphold an objection, the witness cannot answer the question

If I sustain an objection, you must not speculate on what might have happened or what the witness might have said had I permitted the witness to answer You should not draw any inference from the question itself

During the trial, it may be necessary for me to confer with the attorneys out of your hearing, talking about matters of law and other matters that require consideration by me alone It is impossible for me to predict when such a conference may be required or how long it will last

When such conferences occur, they will be conducted so as to consume as little of your time as necessary for a fair and orderly trial of this case

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During the trial we will take recesses During the recesses, you shall not discuss the case among yourselves or with anyone else, nor permit anyone to say anything to you or in your presence about the case Further, you must not talk with the attorneys or witnesses or any parties about anything until your deliberations are finished In this way, any appearance of something improper can be avoided

If during a recess you see one of the attorneys and he or she does not speak to you or even seem to pay attention to you, please understand that the attorney is not being discourteous but is only avoiding the appearance of some improper contact with you

If anyone tries to say something to you or in your presence about this case, tell the person that you're on the jury trying this case and ask the person to stop If he or she keeps on, leave at once and immediately report this to the bailiff or court deputy, who will advise me.

At this time, the attorneys for the parties will have an opportunity to make their opening statements in which they may explain to you the issues in the case and give you a summary of the

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facts they expect the evidence will show.

Counsel for plaintiff?

MR WILNER May it please the Court.

THE COURT Yes, sir.

MR WILNER Good afternoon I'm Woody Wilner I haven't had the chance to speak to you before It's been a day and a half So I'll make up for that by speaking a lot No, I'm just kidding I will do my best to move it along, but I'm eager to talk with you

I only get this chance to address you directly, and then one chance at the end of the trial And so everything else in between will be witnesses who will ask questions under oath And it may be that some of that is hard to understand or you're wondering why they're saying certain things

This is a time in the beginning of the case and at the end of the case when we can try to say Well, this is why what is happening is happening This is what it's all for

So that's what I'm going to do for about an hour, is try to explain what we believe this is all for and why you're here

First let me say We thank you for being here, because it's a real You know, the word

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civic duty is used a lot Maybe it's overused But it's a pretty serious thing This is a great country to have this kind of system This is a really, really good system And we know that it takes your time And we know that there are times when you'd want to be elsewhere

But we can't do this, we can't run this country without your contributions So I want to thank you for being here for that And we take it very seriously All the attorneys and all the parties take your time very seriously We hope we will not waste it. We know it's valuable

And I have but a small amount of time to talk to you and really a lot to talk to you about

You have met the plaintiffs in this case, Grady Carter and Mildred Carter And although you haven't been able to talk to them, they will testify tomorrow

Mr. Carter, Mr. Grady Carter, is suffering from lung cancer. He's had surgery for lung cancer, and we're all hoping that it is successful

We will prove that the lung cancer came from the cigarette smoke from Lucky Strike cigarettes that he smoked from 1947, when he was 16 years old, up until 1972 when he switched brands to

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some other brand, some filter brand, which is not an issue in this particular case at this time

The cigarettes that he smoked, Lucky Strike cigarettes, were made by the defendant, whom -- it's a little confusing, because now their name is Brown & Williamson They used to be called American Tobacco They've merged

So legally they're Brown & Williamson, but you'll also hear American Tobacco. That was the old company that made the Lucky Strikes Today they're here as Brown & Williamson, because those two companies merged

Mr Carter is seeking money damages, damages from Brown & Williamson under the civil product liability laws, which we will do our best to explain it But His Honor, Judge Davis, will instruct you at the end of the case what the law is

I will make a humble attempt to explain just how -- the broad principles and how we are going to fit in But what I say about the law, His Honor, Judge Davis, is the authority on the law and he will instruct you on the law

We are charging that Brown & Williamson was negligent, which is a legal word But it means

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they didn't use reasonable care in their marketing of their product They didn't use reasonable care in getting the word out to people that they were dealing with a deadly product

They didn't use reasonable care to look at their product and evaluate it to see whether it was killing people and whether they could stop that or improve upon it And that is our charge And we intend to prove it

Now, before I go any further let me make a few remarks

Some people say that -- we mentioned it a little bit in the selection, which was, I think, always a painful process, but we appreciate you sitting through it.

This case is too big. You can't -- the issue of cigarette smoking is too big for a jury in Jacksonville, Florida, to consider. It requires the government. It requires the president. Who knows what?

Also, the issues of whether people go out of business. These issues were talked about. Somebody is going to go out of business or not.

Well, let me say first that we are not the legislature. We are not going to ban smoking.

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Maybe we should, maybe we shouldn't It has nothing do with our job Our job is a very limited one And I'll explain what my view of our job is

But our job is not banning smoking Our job is not telling a particular company that it can continue to do business or not However you feel about that That isn't what's going to happen here

We all have roles to play And our role is defined It's a defined role It's limited It's just We're just cogs We want to be good cogs So how do we do it? And I'll get to that in a minute

Other people say Well, look, some people say the case is too big Others say Well, the case is too little I mean, it's so little how can solving one problem between Grady Carter and Brown & Williamson possibly amount to anything? How can we, a small and limited set of human beings here today do anything?

The government, as I said, should get involved, some say Well, let me also offer this

The government is involved Whether you think the government should do more or less in life, whether you believe in government or you don't,

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whether you think there's too many laws or there aren't enough, it doesn't matter That's not what's on trial here

Actually, the government in its wisdom -- and it may not have a lot, but maybe it has some -- set up this system for us to be here It's actually the state government, the government of Florida And it said -- the government said that we can come here and solve problems using what's called the civil product liability laws

Well, let me explain Because when people hear "laws," they think laws mean if you break the law you go to jail And a lot of times when we talk about cigarettes, we hear Well, they're legal so how can you bring an action for a legal product? Well, there are two kinds of law the criminal law and the civil law

The criminal law tells you what products, for instance, you could sell. If you break it, you go to jail. The civil law doesn't say you can't sell the product. It says if you sell the product, you have to obey the civil law

What does that say, Mr. Wilner? It says you have to give an adequate warning if the product is hazardous You have to keep up with the research

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on the product so you know whether it's hazardous. You have to inform your customers about the hazards that you knew or should know. And you have to work on that product and get it better if it's got a hazard. Or if it's so terrible that you can't fix it, then you really have to think twice about selling that particular product

Now, those are all requirements that the state through the civil law puts on anybody in this great country who decides to sell a legal product That's the quid pro quo You sell it, you make the money, but you've got to remember that the civil laws -- even if you get the right to sell it I mean, if it was an illegal product, we wouldn't be here Nobody could buy it. But a legal product, you've got to comply with the civil law

So then you say, Well, Mr Wilner, does that mean a policeman can come into your company and say you're violating the civil liability, the civil law? No This is where we determine whether the civil law was violated Mr Carter is a private citizen enforcing the civil law This is the proper way to do it If it weren't the proper way, we wouldn't be here This is the proper way to make a manufacturer of a product responsible under the

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civil law

We don't have to wait for the president We don't have to wait for the government They have their own agendas and maybe their problems are bigger than what we can solve But the law is set up to allow private citizens and individual juries to solve the civil laws and make a determination whether a manufacturer was in violation

So you say, Well, Mr Wilner, I don't know if that's fair I mean, what you're charging happened a long time ago It happened back in the '40s and the '50s and the '60s and into the '70s Is it fair for us to come back now? And the answer is yes, because some diseases take 40 years to develop It should be the concern for being called on the carpet 40 years later that keeps people from selling products that kill people, at least products that they should be able to fix

So the civil law is designed to give this concern to manufacturers so that they know that if they violate it — nothing may happen for quite a long time until the seeds of destruction are sewn, until in some long-term diseases like cancer some poor person like Mr Carter having used the product as directed and honestly and having bought the

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product after it was sold and having paid fair value for it later on down the line says, wait a minute, I've got a problem And it's perfectly reasonable and correct that we do that So that's the law

Now -- that's not the whole law, but that's the law of product liability that we base the reason why we're here

Now, there are a couple of things also that I want to handle preliminarily before we get into the meat and potatoes of why or how we prove our case that the Lucky Strike cigarettes caused Mr Carter's cancer and that Brown & Williamson was negligent and what to do about it

We have heard the term in jury selection of responsibility, personal responsibility, people make choices and things like that First let me point out There is no claim by anyone that Mr Carter did anything wrong by doing what he did No one is claiming that Mr Carter didn't act reasonably in buying cigarettes, in smoking them, in smoking them all the way down to the butt or maybe just a part of them No one is saying that he smoked too many No one is saying that No one is claiming that Mr Carter did anything wrong at all

There is no claim in this case for

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assumption of risk That is not a legal claim and you will not see it on the verdict form

Do you remember what I was saying, is we're cogs Well, these are interesting questions about responsibility In fact, Mr Carter acknowledges responsibility Of course, he bought the product If he didn't buy the -- products have to be bought All legal products have to be bought or else they're not sold and the civil law of products liability would never even apply. That doesn't really have much to do with it

It's an interesting philosophical issue I mean, I suppose if you were to bring an action against the Ford Motor Company because the brakes went out in your car, they could come to you and they could say, Well, why did you buy my Ford? I mean, you should have known Ford brakes were bad

Well, I'm a little facetious. But that same principle -- that's not in the testimony. That doesn't suggest anything

The way to solve these problems about -- isn't it true that consumers have to buy the product before they can get hurt by the product, and the answer is yes, I suggest that we direct ourselves to the particular task that will be charged to you. I

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think that there will be these interesting philosophical questions come up, but the real task is to answer questions on the verdict form that define what the job of this court, you, the jury, His Honor, the judge, and us, why we're here in the first place

So I suggest -- and we will know when His Honor, Judge Davis, delivers the verdict But these will be, I foresee, the issues that you will be asked to determine One is, was Brown & Williamson negligent, as we will talk about that? Two is, did Brown & Williamson market a defective product? Three is, were either or both of those a cause of the plaintiff's injuries? Fourth, did Mr Carter file his case on time? We'll talk about that at the end And fifth, if you answer yes to any of the first three, what are Mr Carter's damages?

And I suggest to you that there will be no question of did Mr Carter assume the risk or not There will be no question that says was Mr Carter himself negligent, although you might speculate that may or not be so We're here to solve these five questions or however many actually appear on the verdict form, and that's why it's important to focus on what these questions mean So I'm going to

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discuss those in the next few minutes that we have, because they're very interesting questions

Now, there is one I want to just mention, a few things, and get off the top of my head and that's -- next, please Do you remember question three said "cause"?

MR SHEFFLER Your Honor, I hate to object at this point in time, but I think this is argument of legal issues that the Court will instruct at the end of the case in closing argument, and in an opening statement you talk about what the evidence is and what the evidence will be

THE COURT Overruled.

MR SHEFFLER Thank you

MR. WILNER One of the issues that you'll be asked to decide is did, anything that Brown & Williamson did cause anything that happened to Mr Carter. Well, in one sense we suggest that's fairly obvious if in fact their cigarette caused his lung cancer And doctors say that and everybody says that. It would seem to me to be fairly obvious.

But I want to make sure that the meaning and what we contend about cause is fully understood. No one suggests that a cause is

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necessarily the only cause Mr. Carter realizes that by being a link on the chain, without him there would be -- he wouldn't have gotten cancer if he hadn't smoked We all know that He is a cause He acknowledges that His cigarette smoking also from 1972 when he switched to the filter brands up until 1990 when he got diagnosed, that was a cause also There is no question about that We accept that

The question is here, the smoke that he did from when he was a child, the 25 years of unfiltered Lucky Strike, Brown & Williamson has denied that that's any cause And we are here today to prove that it is a contributing cause Maybe all of the cause, maybe only part of the cause But we acknowledge We will make no bones about that, Mr Carter is a cause of his own disease He is He acknowledges that And anything he smoked after 1972 and before, they both contributed

And you'll hear testimony about how cancer is caused Cancer starts with a damage to a cell that nobody can see It's a damage to the inside of the cell, inside where the DNA lives And that cell, that damage can sit there for years They call it the latency period It could be 40 years In this

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case it's over 40 years And it goes along and it goes along, and some other thing happens Who knows what And then that cell begins to divide, and it starts to divide and it starts to divide And you know it's another five to 15 years before that one cell turns into something you can diagnose

So you start backing up in time and you say, well, when did the damage occur? Well, you'll hear lots of technical testimony about that But there is no suggestion -- I think there will be no serious suggestion that the 25 years of unfiltered Lucky Strike initiated his cell -- his cells to form this disease that was manifest in 1990 And if it was contributed to by later events, well, sure, we don't dispute that Of course That's a different issue Interesting

Next, please All right, shift gears a little bit I hope you-all say no, but this is an old advertisement for Lucky Strike cigarettes which is going to set the theme for what I'm going to tell you in a little bit. And what happened to my thing? There it is. Can you see it? Oh, it's just really dim. It's like follow the bouncing ball.

This is a ad that says -- you know, this is fascinating It looks old It says, "Do you

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inhale?" And it's advertising Lucky Strike. And it says, "Let others explain their striking avoidance to the subject. Lucky Strike makes its position crystal clear Inhaling is most important to every smoker "

Well, you know, when I first saw this I said, What, are they crazy? Well, what difference does it make? Everybody knows you inhale cigarettes Today this is so out-of-date it doesn't make sense But you know what? There is a real tragedy that went on, and we'll put on evidence about why this -- not just -- I won't say it's only Lucky Strikes, of course This was just a symbol of the time

The cigarette product as typified by the Lucky Strike and the inhalation, which is different from pipes and cigars, together caused the biggest epidemic of lung cancer and disease in the 20th century All this business started with inhaling and started with cigarette sales going up

Next, please Everyone thinks cigarettes have been around forever In fact, that's not true Skip that one for now

Cigarettes, in fact, are a relatively recent product They are -- if you see, this is the

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curve of cigarette sales versus time Here in 1970 or '60 they peak Now, this isn't total sales This is per person, and it's averaged over the number of people So it's the amount they're selling per person

Look at that You know, in the '20s there were hardly any cigarettes sold And as it got into the '40s, look at the giant leap here after World War II, right around there, '45 Wow! Straight up And then leveled off and then jumped again and peaked and now it's on its way back down That's per capita You know, it's a reflection of how many people are smoking versus the entire population But it's not just that there are more people, because that wouldn't do it. There's more people smoking and now there's less

So the cigarette is a pretty new product. It's a 20th century product, and there's something about inhaling a cigarette that's different. It's not the same as a pipe; it's not the same as a cigar What do you care? Well, it's a big difference

Next, please. I'm going to now show you something that has not really been publicized much, and I hope when you see it you never forget it.

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This evidence and other medical evidence will be discussed by the doctors that testify Dr. Bruce Yergin will testify from Memorial Hospital here Dr. Alan Feingold, who is a specialist in these issues and in the diseases caused by cigarette smoking, he will testify probably Thursday

This information is available, but it is not publicized very much And it is something I suggest to you as you look at it more will just floor you Because if you see the different types of cancer are plotted in terms of how many occurrences -- and this is not the number in the country This is per 100,000, so it's a rate It's the same scale as the cigarette chart And most of these cancers are not going up

I mean, you hear a lot about cancer in the air and cancer in the water and all of that stuff But none of these cancers of the colon, the prostate, the pancreas, the liver, all of these are pretty much not going up very much in the general population But I don't have to tell you about that

What in the world could be doing that? Well, that is something that I am going to prove to you people began in the 1930's See how it started

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up? Right when it crossed the liver there back in the mid-'30s the scientists became very concerned, because that's what's called the secular trend It means it doesn't seem to be cyclic It's not going back and forth It's just going up It's like what's happening, you know? There is something happening Something is changing People haven't changed

You know, you can't look at Grady Carter and say that he -- this is death rates and Mr Carter is still with us He wasn't far from joining this curve somewhere But is Grady Carter any different from the people who lived back here?

We will suggest to you that the reason this looks like this is the introduction into the market of a particular product when inhaled as expected that caused a terrific and unexplainable otherwise and tragic rise in cancer of one kind, predominantly. There were other kinds that were also involved. But this is the key killer, which has made lung cancer the number one killer among men and cancer and the now passed breast cancer as the number one killer in women, too And it's all because of that little cigarette that was introduced in the '30s that said go ahead and inhale it.

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Why do I care about inhaling? Well, actually the statistics -- and we don't have time to show them all to you, but the pipe and cigar smokers don't have this problem Tobacco has been used for years And it really isn't a matter of whether you like tobacco or not Because tobacco when it was used years ago and people just -- you know, they smoked a little after dinner and maybe the men got together and they put on their smoking jackets and they went into the smoking room and they had some cigars That didn't cause that

And this idea that, well, everybody knows that tobacco has been dangerous for years Well, that's more of a moral thing I mean, some people just don't like it on moral grounds But who cares? We're not here to give moral business We're here to say that that indicates a defective product was introduced into the American economy around 1930, and that that is a very serious problem which bears our attention

And we will prove to you not only that that is the signature of the cigarette both on a large scale and a microscopic scale, but that the defendant, Brown & Williamson, was aware of what was happening and decided that really it had to stay in

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the business, basically come what may And that's our negligence claim and our defect claim, because we feel that the cigarette was designed in such a way that it caused that problem and that didn't have to happen either

I'll tell you what we'll -- as this trial goes on and we have more time we'll see how the prospect of cigarettes which would not cause these problems was discussed, tested People thought about it and in large measure decided that it would be bad for business to bring them out. So they continued selling the unfiltered product, which is probably the worst of all, up through at least 1972 where we're concerned and even today without suggesting for a minute that really that's what we're dealing with

Next, please So you say, Well, Mr Wilner, that sounds like a big problem and I thought you said we wouldn't be handling too big a problem. Okay I promise that we will not have to handle the biggest problems in the world, just our little -- we'll just be good cogs and see if the problem can be solved. Okay.

Remember when I said in the 1930's the doctors started to get together and they decided

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something was amiss, you know, something was rotten in Denmark and lung cancers were going up and they didn't know why? Well, you will hear tomorrow or Thursday a detailed discussion of all of the -- not all, but there is never any all, but many, many of the important medical articles or literature that came out in the '30s and the '40 discussing this terrible problem

Now, when I say medical literature, it sounds good but I think maybe who knows what that is Well, let me explain Medical literature is -- you know, when doctors and researchers working in labs and also doctors treating patients, when they see something funny, they -- it's a great tradition They look at it and they talk to their colleagues and they say, you know, we saw four lung cancers today We haven't seen those in years What's going on?

Dr Jones, did you see a lot of lung cancers, too? Yes, I've seen a lot lately Well, I wonder what's happening? Well, did you talk to your patients? Yes, I talked to them Well, did anything come out of that or is anything common? I mean, did they all work on a farm or what?

This is the way that things begin So

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doctors begin to talk and then they get together And eventually two of them get together and say, you know, we talked to doctors all over the city and every gol-dang one of these lung cancers is a heavy cigarette smoker Hummm? And they all say, hummm? Isn't that something? We'd better write this up because other doctors better know about this So the first couple of things come out

And actually the first couple of things came out in England, 1927, by a doctor called Talcoat, and he observed that almost all of his lung cancer patients were smokers He said they did Well, that's enough to get the ball rolling when you consider that lung cancer was considered completely incurable At that time it was 100 percent fatal It was not a disease that anybody would take chances with It was a hundred percent fatal

It wasn't until the '30s when they began to perfect -- not perfect -- they began to experiment with lung removal, complete lung removal, and the patients survived I mean, for a while they didn't survive -- that they even could talk about lung cancer cure. And, you know, it's one of the big disappointments in medicine that it hasn't helped much. Lung cancer cure still runs between

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five percent and 15 percent for five years' survival, depending on the kind of cancer you have So it's terrible.

Why is it so bad? The lungs don't have pain cells. They don't have pain nerves They don't have receptors So when you start getting a mass in there you don't actually feel it It grows It's not like your brain If it grows in your brain, you get headaches and seizures because there is no room for it But in a lung there's lots of room for it, so it grows It grows for years

You go in for a chest x-ray, they say, oh, my God -- or something happens The tumor as it grows blocks its own blood supply The tissue dies It starts to bleed You cough up blood You're scared to death You go in Oh, my God, it's bad Maybe we can help you, maybe we can't

Lung cancer is a terrible cancer It has one of the worst survival of any of the cancers, right up there with brain and pancreas You just can't cure it Hopefully Mr Carter has survived He's survived five years and we're all hopeful That's all we can say

All right I've got to move on So in 1927 the British doctor says, All of my lung cancer

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patients are smokers Uh-huh I wonder why that is? Drawing the stuff in your lung, you know Two and two

Okay Another doctor in 1936 says 90 percent of our patients are chronic smokers We believe that inhalation of tobacco smoke may be an important factor in producing chronic irritation That is Arkin and Wagoner, 1936, Journal of the American Medical Association Pretty good

Now, what is a manufacturer of cigarettes to do? A, you read the literature You've got to You're an expert. That's part of your job B, you start looking at this and you say, Oh, my God Could that be us? Could that be us? Is this a deadly product? And, C, you immediately act to confirm it, deny it, by research, not by blabbing your -- you know, flapping your jaws. Not by public relations, but by research. And you figure out what's going on and you solve the problem because you've got to -- your number one responsibility is to your consumer

You put your profits -- if you put your profits and your sales ahead of your consumer, you're tripping the product liability law right there And you as a manufacturer are taking your

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chances If you decide business as usual, hope for the best, then you enter into a bargain with the devil. You're going to hope that nobody is going to get sick and come back.

And we'll show that that's the bargain They said, Well, we're going to -- business as usual We're not going to admit it. We're going to keep our -- we're just going to keep denying it and keep selling cigarettes and hope that this day doesn't come that somebody comes in here and says you violated the products liability law and you killed me or you hurt me

All right Got to move I'm up to this This is 1941. It's a fascinating article I wish I could tell you all about it These people who wrote it were the greatest doctors of the day It was Alton Ochsner and Michael DeBakey They were renowned surgeons that were -- we have it as evidence It has 400 citations in five different languages, all the known causes of cancer of the lung

They discussed the theories Could it have come from the roads? You know, people were putting roads down back then Could it have come from the air? Could it have come from the cars?

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And they discussed all of that, and they say No way, because the people living in the cities and the people living in the towns are getting it about the same, and so forth and so on

And they go through very detailed reasoning, and they come out and they say -- next please -- it's our definite conviction that increase in the incidence of pulmonary carcinoma, which is lung cancer, is due largely to the increase in smoking, particularly cigarette smoking And the end of the quote was, which is universally accompanied by the practice of inhaling So they knew 1941 So where was American Tobacco Company in 1941? When this happened what did they do? The answer is silence

And I'll fast-forward you because I'll never get to it at this rate But everybody is sitting and thinking, Well, there has been a warning on cigarette products I mean, you know, Mr Wilner, what about that? So the fast-forward is because -- I hope to get to it in time, but I'll probably run out -- nothing, no warnings, no cautions, no nothing on the product where people have a right to see them, where people who buy have a right to see that the manufacturer warns them, not

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that they hear it somewhere else in the radio or wherever. They have a right, because they may not believe what the government says or what somebody on a television program says They have a right That's the law, they have a right to see it

In 1966 -- and we'll spend another five minutes showing you all that happened between '41 and '66 You can imagine the kind of research that went on Not a word In '66 they're made to put a warning on by Congress, and the warning says, Caution May be hazardous Which was one of the biggest understatements in the world at that time

In 19- -- anyway, I'm just giving you fast-forward I'm not going to go into detail But that precautionary label stayed on until 1970 when a slightly different one went on that said The surgeon general says smoking is hazardous It didn't say anything about cancer

When was the first time cancer was mentioned? '84 '41 to '84 Cancer is now one of the four rotating warnings that were required by the federal government in 1984 And that's fine I mean, we're not talking about 1984 We're not talking about the federal government

'41 Duty? We will present evidence

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they had a duty then to take this matter very seriously A life and death matter And they did nothing. Nothing constructive Everything destructive by trying to tell -- trying to get people off the track Keep advertising Keep suggesting it's okay

Next I'm not saying it's wrong to advertise I'm saying it's wrong to advertise carelessly and suggest that the product is harmless when you advertise We'll get to that in a minute

All right, 1950, Journal of the American Medical Association, tobacco smoking as a possible etiologic -- that means cause -- factor in bronchiogenic carcinoma You'll hear all about this This is the famous Wynder/Graham paper Wynder and Graham were crusaders, pioneers in this field.

They studied 605 lung cancer cases. Fifty-one percent of the lung cancers and 19 percent of the controls smoked over a pack a day, and they said that definitely is not average That isn't random. We're getting a signal here. This is a very important problem And this was after the war. This was an application of the technique of epidemiology, which is a modern and an accepted

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practice for determining whether certain things are impacting people, whether they are causing disease

There has been much research done in the field of epidemiology Epidemiology, the word comes from the word epidemic It started a long time ago when they were trying to figure out what caused the epidemics You'll hear all about the Wynder/Graham paper and the six or seven that I have skipped over

Next, please Also on the same year -- oh, this is from Wynder/Graham This is an interesting concept The less a person smokes are the less his chances -- it's spelled wrong -- of cancer of the lung develop and, conversely, the more heavily a person smokes the greater are his chances of becoming affected with this disease It sounds so simple

I mean, why am I saying this? That's the concept of dose/response It means, you do something more -- the more people smoke, the more they have got cancer And they were very interested in that because that means there must be something going on You see, if it were just some bolt from the blue where just certain people got cancer and certain others, you could always argue, Well, I

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don't know Maybe it just -- you know, just happened But to see that as you went along the more people smoked the more they got it, there was something going on inside

Dose/response was one of the most important things to be discovered And every study that has looked at cigarette smoking -- there are thousands I couldn't even begin to list them Everyone that has ever tested it has found dose/response in spades It's just like saying, is the sky blue now? I mean, yes How blue is it? It's real blue, real, real blue Now, does everyone agree? No Brown & Williamson evidently doesn't The sky is not blue for them So I am up here until I'm blue in the face trying to say, Yes, the sky is blue and this is the real world

Okay, Next This is Dr Evarts Graham in the famous mouse painting experiment in 1953 I apologize to the people who, myself included, who do not approve of -- or don't look happily on using animals to do research. But sometimes it has to be done so that's fine

And next, please. This is what happened to the poor little dears Cancer on the back This was an absolute demonstration This was from

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cigarette tar, 1953 So this was something that people really said, well, now here, not only do we have this irrefutable epidemiologic proof, but now we've got proof that the agent in the tobacco is actually causing cancer

So immediately the cigarette industry, Brown & Williamson included, said -- after the epidemiology came out, they said it doesn't prove anything because you haven't shown it in the laboratory and you haven't proven it on animals This came out and they said mice aren't men Okay Well, you can't do it on men because it's unethical

And as a matter of fact, the cigarette industry, Brown & Williamson included, used the same way -- they called it an assay test -- the same test on mice for years secretly They used this to determine whether their products -- how bad their products were So after publicly denying that it was -- it didn't prove anything, they went back in their laboratory and started doing it

Okay, next What happened in 19- -- what happened after the mouse painting experiment? Well, Brown & Williamson, American Tobacco and the rest of the industry had a problem They had a problem that

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it had now been proven that cigarette smoking caused cancer to any doctor just about who would listen It had been proven clinically by doctors who looked at their patients and asked them It had been proven epidemiologically by the accepted techniques of the day almost without refutation There were always a few who didn't agree, but the mainstream had definitely concluded it And this is a serious problem

I mean, if we knew here that apples may cause -- that there is a scare that an apple you eat may cause cancer, Oh, my God, they take them off the shelf It's not a matter of every last person finally lining up and saying Yes, you know, I now accept it I mean, if it's a genuine scare, you do something about it

Why was it that not much was done about cigarettes? Some people feel because it's not a food. It's not in the Food and Drug Act. Well, you know, actually inhalation is a more intimate form of contact with something than eating it. When you eat something, it goes through you, so to speak. But when you inhale it, it doesn't.

Your lungs do not have any of the mucosa, that area in your gut or the lining in your gut

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that's so powerful and can keep out things that aren't good for you. Your lungs are very delicate And inhaling things is very, very -- it's an immediate contact.

And do you remember back about inhalation? Why do you think cigarettes sold so well? When you inhale the nicotine, nicotine goes to your brain in like three seconds Your lung is as big as a tennis court in area And so when that smoke impacts your lung, it goes right in and you get that

Nicotine is a drug We'll prove that in a minute But you don't get that buzz without inhaling and that's why they started selling so many cigarettes Because it felt good to do that It tricks your brain Your brain thinks, Great, give me another one That's the way your brain works

There is going to be a lot of talk about people smoke because they like to Well, of course, they like to Their brain says Give me more That's the way it works There are receptors up in your brain They're special things that attach to certain molecules that come into the smoke

And, in fact, it's shown, and some of it was shown in secret research by the cigarette

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companies, Brown & Williamson included, that proved that your brain changed when you smoked and that these receptors changed and that afterwards you were -- maybe for your whole life left with this craving So maybe you'd say, Well, I can get over the craving Okay Maybe you can, and maybe you can't, and maybe you'd go through agony to get over it

Now, one of our claims is addiction You know, people say addiction is you could quit or you couldn't quit. Huh-uh Addiction is agony Addiction is craving that you can't fulfill, an itch you can't scratch. Addiction is -- does it mean what's humanly possible? I don't know? Could I run a four-minute mile? I don't think so But could I if I trained? Maybe I don't know I mean, human -- no one knows where the limits of human accomplishment are, but we know where agony is We know what it takes and that it affects every person slightly different.

And the research that has come out -- and I'll share it with you to the extent I can -- shows that as the brain changes in response to nicotine that it gets in it, something that -- the change is that it always wants more. And that lifelong

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smokers when they're off are never the same.

Grady Carter went through hypnosis. He went through counseling. He went through agony to get off, to get off the drug And he finally got off, all right, when -- you know, right around the time he was getting cancer and he coughed up blood he got the shock of his life And, yes, you bet, shock cures smoking Sure it does It doesn't leave you without agony, and he's still in it He's still got his prescription for nicotine gum.

Now, I mean what kind of a product does that to a normal human being? What kind of a product reduces a normal human to this craved, you know -- I mean, he's not a -- you can make up your mind about Grady Carter whether you think he's a good person or not, but he is certainly a normal human being here I mean, you're not talking about somebody crawling around on the street for another fix

But what kind of a product in this society can do that to people, can make it so that they blame themselves that they can't quit? I mean, the whole world is like that And, you know, when you looked at that rise in lung cancer, all those people are to blame because they can't quit? It's weird

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It doesn't make sense It must be something else It must be if you stand back and look at it, you've got the wrong chemicals coming in affecting the brain and they're doing it more now because of the inhalation because of the epidemic in this century It's really quite a story

Next -- oh, I didn't do that Oh, yes

Okay So what did the cigarette companies do? What did Brown & Williamson do? It was 1953 They had these problems Did they say· Okay, problem, let's solve it? First, tell our customers, bad news here Addiction Cancer Maybe other diseases Did they say, Okay, we're really going to find out? Did they say, We may not be able to keep selling this? We're going to have to change our product. We're going to have to turn it into something you can't inhale We're going to go back to the way it was in the '20s when you could enjoy tobacco if you wanted without dying

Unfortunately, you'll see in a long, long -- I hope not too long -- series of documents that we're going to show you that the cigarette industry didn't do that at all. Having the opportunity, having the opportunity to make good, to do right, to care for their customers. Instead they

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try to buy their way out by things like this. This will be in evidence.

And, you know, it's a lot of self-serving stuff. They say how they're going to do research which is the -- you know, which is really the most horrendous joke of all time But this -- you can't see it, but it says here we accept an interest in people's health Yeah, right. And then they say we always -- oh, up here Wait a minute Where they say we do not -- there is no proof that cigarette smoking is one of the causes of disease

That has been the mantra of the cigarette industry, including Brown & Williamson, to today And in saying that, the evidence will show they have become the only people saying it in the world They are an isolated industry now hanging onto the idea that they can keep saying that their product doesn't cause diseases I guess until somebody says to them, No, you're wrong, it does cause diseases

But anyway, they took out this to try an influence people and to try to get people not to worry I know you can't read it, so I'll just summarize It says basically, Look, you've heard about some problems because there was press -- certainly there was -- about the mouse painting

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experiment, Wynder and Graham It was publicized

You know, these doctors claimed that it caused cancer There was no question Some people believed it, some people didn't believe it I don't know These people or the cigarette industry through this tobacco industry research committee, which they were a member, decided that what they wanted to do was to protect theirs and try to argue the other side Always trying to say, Oh, no, no, it's not proven It's not really proven Don't worry

Well, you know, that's interesting The day you do that you've really made a bargain with the devil, I suggest I mean, now you're saying, Okay, we're going to argue our side to try to -- so you won't feel nervous about cigarettes. So that stuff you read or the stuff you hear, don't worry about it. It may not be true We'll hire some doctors that say it isn't really true. We're not convinced. It gets you to lull you, to hope that you'll keep inhaling and to keep buying the product.

Now, we'll prove that that is a violation of this products liability law that happened back then and reaches fruition today Just because it

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takes a long time to grow cancer in people's lungs
Next Moving on I've only got about 15 more minutes and I still have most of the plates that I wanted to show you, about 90 percent of the plates I'll do my best
Okay So -- Mr Wilner, you kept telling us all these studies that happened back then What's the big deal? Well, look, I've got to show you this This is bread and butter stuff This is from 1954 and extended to 1958 It was from a big study done by -- for the American Cancer Society and this was a bread and butter study done to prove or to show whether or not cigarettes caused cancer And they found that -- this is the number of packs per day and the cancer death rate is 217 for lung cancer and for nonsmokers it's three
Well, I don't know you, but I suggest to you and the evidence will prove that when you get numbers like that, like almost 80 to one or something, that you are talking about a very serious effect I mean, you can't possibly explain You know, you can stand on your head and you can't explain a situation like that
And we will put on evidence that that information is what has to be conveyed to people

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Not the generalized idea you may get cancer Anybody may get cancer Not the idea that you might get from the newspaper it can cause cancer, because lots of people think lots of things cause cancer I mean, you know, the air could cause cancer People think air pollution They think bad food Who knows?
That doesn't convey this I mean, do you think that if the risk of lung cancer from the air from living in one city was 217 and the risk of another was three, that that situation would go on very long? No way That would be a panic That would indicate that there was something terrible going on That city would be evacuated These are deaths These aren't just people who feel bad
This kind of thing -- the incredible thing about it is it kept happening and happening every time somebody said, Let's do a study and let's do it really well and let's get the biggest study we can get Let's get a million people. Let's get a million man years Every single time it comes out like that.
Next, please Total death rates are twice as high for cigarette smokers as for nonsmokers, as proven in this plate from 1959 Total death rates

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are twice as high. I think cigarette smokers and nonsmokers need to know that information. That means that 50 percent of cigarette smokers, regular cigarette smokers, will die prematurely from cigarette smoking from one disease or another
That is something that everyone who considers whether they smoke cigarettes should know Not just the general idea can cause disease You're talking bad odds Fifty percent is a bad odd It's bad It's a high risk. Nothing else you do has anywhere near that kind of risk
Why isn't this public? I don't know Interesting You can evaluate this evidence when you hear it come in You can see who has publicized it, where it's been, how reliable it is I invite your consideration of that
Next, please Two to one Death rate two to one
Here is dose/response in 1952 Well, let's not get into it I don't have time
Next, please And -- okay, these are just all the studies I don't want to bore you Every single one showed a huge increase from cigarette smoking, every single study Some of them were lower than others There was 120 percent That's

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the lowest I've ever seen This one is 1300 percent among smokers This is 3600 percent Consistency
Next, please These are all from the '50s, never responded to 1,000 percent, 7,000 percent, 2,000 percent All consistent Never responded to
Next, please Okay Here is another line of proof Since we're talking proof, let's talk proof This was an important pathology study Pathology is when you cut the lung or you cut the tissue and you look with a microscope and you see what's happening in the microscope. This was really another leg on the chair, you know, another link on the chain It wasn't necessary, but the scientists wanted to prove, Well, look, we want to prove that there are cellular changes happening and we strongly suspect there are.
So here is the lung of a -- this is a normal lung in a nonsmoker And you can see that they've got -- this little area up here is called the cilia, and they're little hair-like things that pump mucous around inside your body, inside your lung And they're important You need them. So this is normal; a person looks like that.
Next Remember that little area This is

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what happens in a moderate smoker Ooh, they're almost gone. And the cells here are beginning to look kind of crudy And this was done in a large scale -- I'm just pulling out two, but this was a big study done in 1957. Actually this is '55 data so it's even earlier than that. See these cells. They don't look so good They're on their way to becoming cancer cells

This really shook people up when they saw it I mean, people knew -- were beginning to know But scientists understood that this was an incredible thing to show in all these people that they were getting precancer

Next, please Here is a heavy smoker That's cancer in situ or actually a preinvasive form of lung cancer which was unknown to that patient These are typical lesions and they happen in all of the series They happen in a tremendous percentage among the people who are heavy smokers And they proved beyond a shadow of a doubt that the stuff was getting to them and was capable of causing the cancer and was causing the cancer As if anybody really needed that information at that time The scientists were pretty much convinced, but it's another link on the chain and it's important

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Now, what did the cigarette companies, including Brown & Williamson, have an obligation here? I would think that this also has to be publicized, because some people may be skeptical They may say, Well, it might not happen to me It will happen It will happen to you Your cilia will get damaged When they're damaged, the protection of your lung is damaged So it will happen to you

Now, that doesn't mean that we're here to ban smoking It just means that we suggest that the product liability law required full disclosure, not beating around the bush and certainly not arguing the opposite and saying don't worry

Next, please Moving along This is emphysema Mr Carter has emphysema. It's mild, we agree. It's caused by cigarette smoking, as even the consultants for Brown & Williamson now admit Now, this is what it does to your lungs Mr Carter's case is mild now It's incurable and largely irreversible. This is -- one of the biggest problems of cigarette smoking today is chronic obstructive pulmonary disease of which emphysema and chronic bronchitis are a part.

Next, please That's the rise of

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emphysema. It looks just like the rise of lung cancer caused by inhaling cigarettes

Next, please. We have lots to go I've got to go fast

All right This is incredible Ninety-one percent of the people in this series who smoked unfiltered cigarettes got emphysema, grade four or five fibrosis, which was his term for emphysema at the time Look at that Ninety-one percent of them. That means it's not a bolt from the blue It's a process that happens If you live long enough, you're going to get one of these diseases We hope not, but it's likely to happen to you

Next please And heart disease -- oh, urban/rural I just wanted to point out that people who have said air pollution, they were proven wrong in 1958 Here is the urban/rural distinction It's true that more nonsmokers -- these are nonsmokers down here getting cancer These are the smokers getting lung cancer up here There is a little difference, but it's a joke compared to the difference in cigarettes

That kind of evidence, you know, it just blows you away I mean You can always say, oh,

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what about air pollution? Look at that That's the evidence It's a little tiny bit but, you know, who cares? The sky is blue Sure there is a cloud It's the sky is blue, though

Next And this is the sad thing that happens when you start young Nonsmokers death rate right there If you start under 15, you've got 16 times the risk, 1,600 percent If you start -- if you can wait five years, your risk drops to there If you can wait until you're 25, it's only one-third of if you started under 15

It's something to tell children It was never put on the package It should have been put on the packages This is back in -- this says '66 This information was available in 1955 It should have been published right then You bet. If you smoked really young, your risk is much, much worse because of your growing lung problem, you know, how it grows and the cells are dividing You're really vulnerable

And, you know, once that happens you can't take it back You can't go back in time and say how I've decided I don't want to smoke. And kids start smoking Why do they smoke? Well, maybe if their parents had that information, they'd be tougher on

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them Maybe not But they deserve the information If they're not tough, they're not tough I mean, we can't cure the world But the product liability law says you put the full information out there and then you let people do what they want That's the way this country is run

Next, please And heart disease, oh, boy, sudden death, which is falling on your face and dying without warning That's nonsmokers, that's smokers It's enough to give you some thought You'd like to see it publicized

Next, please I'm sorry to work you I'm working her, aren't I, but I'm almost done I'm running out of steam

Okay What's in cigarettes, you say? All sorts of crazy stuff Why hasn't it ever been put on the label? Good question Known carcinogens are on cigarettes that have never been put on the label There is no excuse Anything you eat, you have a right to demand what you're eating And if you smoke, you have a right to demand it It's been hidden largely and it's never been publicized I won't go through all the names because we don't have time But you'll hear about them later

Next, please I'm trying to finish

That just shows that all of the studies are very high

Next, please Twenty times the risk

By 1962 all of these organizations had concluded it was proven They had -- many of them before that, the American Cancer, American Heart, Public Health Cancer Brown & Williamson is not on the list

Next, please Let's skip that That's too many numbers We're running out of time And skip the next one

Okay I just want to share this one with you and then we'll take a break from the numbers When the full impact -- this is today This is from CPS II, which is today's epidemiology, modern stuff It doesn't differ very much, but it's bringing everything up-to-date This is the kind of Reiteman Weep figures that are important to understand when anybody ever talks about risk because this is the risk of smoking, right here

Smokers versus nonsmokers And look at the risks down here I mean, there are some things you've never heard about, like cancer of the bladder, 286 percent increase Why isn't that publicized? It should be.

Cancer of the kidney -- you know, people may not want to take that chance of cancer of the kidney Maybe they've lost a kidney already and they don't want to take a chance So why is it there? It should have been a long time ago This isn't new This is just up-to-date Cancer of the larynx, 1,000 percent Cancer of the lip and mouth 2,700 percent That's a terrible statistic And cancer of the lung, the current view is 2,236 percent increase Ninety percent of all the cancers in the lung in the United States are attributable to cigarette smoking

That is the current modern belief that all the scientific community that's addressed has expressed in the surgeon general's report in 1969 And I think that that merits a little bit of looking at I mean, that is not just one of the risks of living That is a major, major problem, and it is incredible that it hasn't had more publicity

Next please Ninety percent Moving on

These were the warnings I promised to tell you Before '66 none '66 to '70, that's the warning -- we're mainly back here in this area in this case The damage was done to Mr Carter's lungs from '47 before '66 That damage was done

We'll prove that And there was nothing on that '66 to '70, this mild, may be hazardous In the face of what we've seen, was that adequate? I suggest it wasn't

Next, please And these are the current ones right here The one mention of cancer in 1984, the three that don't, and this is the other one that just says it's dangerous, but it doesn't say how much It doesn't say what or how, whatever

We're not -- our claim stops in '72 because of the -- we get into that maybe a little, but not much Most of our damage is early and, you know, we can all speculate whether in '84 or not, but it's not a legal issue today

Next This tells us why that none of these warnings -- or the '66 warning anyway wasn't any good, because it just isn't the kind of thing that motivates people It doesn't say don't inhale, which is what it should have said It doesn't warn of addiction It never did Addiction was known It was never warned It didn't give advice to minors It should have done that It didn't warn of excessive use It should have done that It didn't list the ingredients It should have done that Lots of problems

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They could have solved them This is all warnings I haven't even talked to about how they could have improved the product, how they could have made it so that it was much less likely that people got cancer, how they could have really worked on filtering the carcinogens out of that smoke, how they could have reduced the amount of nicotine in it so that it wouldn't get people hung up, and how they could have produced a product that avoided the kind of dangers that they were faced with

I won't have time to tell you in detail You'll have to hear that when the doctors testify

Next, please Five minutes? An hour Oh, okay, so we've got another ten minutes Good Not good -- maybe you say not good Time to sit down I understand I'm almost done

Okay So, Mr Wilner, you talked about addiction First you talked about cancer and all these diseases Talk to me a little bit about addiction because, you know, I've heard about it What is it? What's the evidence going to show about addiction?

Okay Cigarettes have nicotine which is proven to be an addictive substance There has been over the years some debate, some legitimate debate

The lung cancer business, there really has not been legitimate debate There has been cigarette interests denying things, but not legitimate debate

But over addiction there has been because way back when most people only used that term to talk about addicts that were in the street shooting heroin And that -- it meant that you were out of your mind and that, you know, you were robbing grocery stores I mean that was kind of a pejorative nature of addiction

So back in '64 when the surgeon general wrote his first report, he said, well, we don't consider cigarettes part of that because that's a drug culture and we think cigarettes are a habit Incidentally, the '64 report said cocaine is not addictive either It's just a habit So, you know, who knows?

Anyway, things began to roll That was not the only -- there is an interesting twist to the '64 report that I will mention just parenthetically, and that is that it appears that there was research done by certain cigarette companies that proved that nicotine was addictive that was never turned over to the surgeon general before 1964 Interesting And

I'll show you that in a minute, just in the next minute

Next, please Oh, wait Before you turn that Eight out of ten smokers say they wish they had not started Seventy percent of young people who smoke say they are dependent And, you know, forty percent of people who have their larynx, their voice box, removed for cancer, 40 percent of those go back to smoking through the hole If that's for taste, I can't imagine how since your lungs can't taste anything It doesn't even go through your mouth

So how anyone can contend today with what we know today about the action of nicotine on the brain, that nicotine does not have the capacity to hook you, whether you want to call it addiction, dependence -- I don't even care what you call it The point is, it's a chemical that hooks you Does it take away free will? No, not really You've still got your will, but you've got the agony of this drug in your brain And that's a problem

I think that's a problem I think that that is not something to blame on the consumer of the product who got the drug in his brain I think that's something to go to the manufacturer and say,

why is it this product is putting this drug in people's brains that's making them act like this and keep taking products that they don't really want? Or they may want a little or they may even like it but they know they shouldn't What a strange product it is

Next, please 1988 report of the surgeon general, major conclusions Cigarettes and other forms of tobacco are addictive The surgeon general of the United States Not just Mr Wilner

Nicotine is the drug in tobacco that causes addiction The pharmacologic -- that mean drug -- and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine This is the surgeon general of the United States I mean, those are fighting words That doesn't pull any punches And this volume, which we have here -- somewhere -- I forgot where I put it -- it's a big thick volume and it documents it all These are just the conclusions I pulled out This research has been done and it's a drug

Now, again, you say, well, this is a big area of political controversy and the FDA is going to regulate or not regulate Again, that's not our

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function here. We're not the FDA We don't have to decide that.

The only reason this is important is this is part of why we think this product was defective and why we think Brown & Williamson didn't do its job. And they knew that it had this power, and the least they should have done, the least is to tell people about it. And say, look, remember, this is serious You can get hooked

Instead of denying it all the time and saying, aw, anyone can quit, just make your mind up. They should be honest and say, no, no, no, listen This could be a lifelong problem This isn't just a little silly thing that you're doing It's not just a candy It's not a breath mint It's not chocolate

The suggestion was made in jury selection that you can get addicticted to golf Chocolate and golf causing cancer, a 2,000 percent increase in cancer? If so, it would be a serious problem to get addicted to chocolate if it caused cancer, 2,000 percent, if it killed 50 percent of the people who used it You bet you I'd go right back to those chocolate people and I'd say, what's in here? What's going on?

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This is not something -- you cannot trivialize it and say this is only chocolate No big deal It's chocolate

Next, please This is the one of the latest statements from the medical literature, physicians in 1991· Tobacco experimentation frequently leads to daily use, which is characterized by a highly consistent pattern of drug intake Such a pattern is controlled by the biologic concentrations of nicotine, a psychoactive -- that means it acts on your brain -- constituent of tobacco smoke This is the science

Next, please. It's not a matter of just guesswork It's -- oh, remember I said, like heroin This is a great chart and this came out of the '88 I'm almost done with the charts I know it's getting late

This is the relapse rate. You know, everybody can quit. Anybody can quit smoking The trouble is the relapse rate is horrendous. Only about ten percent of people who try succeed in any particular year

Look at the relapse rates for these drugs There is heroin. This is months relapse down at that time bottom, months And this is

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smoking cigarettes and that's alcohol What does that tell you? It's so similar. It tells you there is something not biological, not that it's just a matter of, by golly, I'm going to do it today. Well, heroin addicts can do it, too, but they relapse A lot relapse

It doesn't prove that you can't do it. It proves that it's agony It proves that it's a drug in your body that maybe you didn't know about when you first got started and you really should know all about if you're going to put these drugs inside your body because they may stay with you your whole life

Next Commissioner of the FDA said, More than 15 million individuals are unable to exercise their choice, which is smoking or not, because they cannot break their addiction to cigarettes My concern is that the choice that they are making at a young age quickly becomes little or no choice at all and will be difficult to undo for the rest of their lives

Next, please That's the commissioner of the FDA I don't need the death rate again I don't need PETO Got to get to the end Oh, yes, put that up I always say one more turn Okay Now I'm going to get to something interesting and

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then I'm going to be done

Okay Again, it's this business of chocolate, you know, risks of life You've got to see this This is a risk of various activities This is out of the 1979 or '89 surgeon general's report These are the deaths per million for exposed people 7,000 per million died of cigarettes Five hundred die of alcohol 275 die of alcohol from disease

So, you know, a lot of people say, well, if you're going to sue about cigarettes, why don't you sue about alcohol? Well, this is one good reason Alcohol can be used responsibly It does not kill 50 percent of the people It does not Among the users, 541 are killed Most of those are in accidents I mean, those are accidents We certainly are not here telling you to drink and drive That has nothing to do with what I'm saying.

275 get involved with disease and alcohol I think that's terrible. I'm not here to tell you it's good I'm just telling you that we're not here to talk about alcohol, we're here talking about cigarettes which kill 7,000 out of a million So we're here today as our little cogs to talk about

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that; 7,000 as opposed to 241 alcohol deaths as opposed to 95 motor vehicle Look at the air pollution Six per million. Look at the football That's the same

I mean, this stuff is silly This is the biggest thing around Not too big for us to handle We're cogs We're just here to do our job We're just here to follow the evidence and follow the law That's all we can do

Next I don't need that Thanks Cut corners

Okay What should they do? They should don't inhale cigarettes They should have said that from 1941 -- from 1949 Don't inhale Don't inhale It kills you to inhale It addicts you to inhale Don't inhale

Next Build a cigarette so that you can't inhale it. Put this package insert in your cigarettes It says Danger Health hazard And you'll get this package insert, and it has detailed direction You know, whenever you get drugs, buy a package of something, and you open it up and it says, oh, gosh, you know, all these studies that have been done and the risk That's information

Now, look, you read that You're on your

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own You read that, you're on your own You deserve to get it If you tell me that you ain't going to read it, okay, you ain't going to read it But this great country demands information because it's a free country So you've got to get the information We're going to present you with what we think should have been folded up in every cigarette package and give people so that they're able to make informed choices, not choices based on who knows what, hearsay, God knows what

Next Okay All right Now, here is my last five minutes of comment

When all of this was going on, what was going on with American Tobacco, the predecessor of Brown & Williamson? What were they doing when all this research was coming in? What were they doing when they were finding out that cigarettes were causing lung cancer 2,000 percent higher? What were they doing?

This is what they were doing Business as usual "Reach for a Lucky instead of a sweet." Inducement? Trying to suggest to people it was good.

Next "There is never a rough puff" "Let your throat be the judge." The number one

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cause of throat cancer "Let your throat be the judge"

Next "Be happy Go Lucky!" You've seen these Maybe they don't mean anything Everybody advertises their product But you've got to remember while all of this was going on, research was proven that they were cancer, that they were death Nothing about that suggests the slightest. I wonder whether you can go too far with this

Next Be happy Go Lucky Don't worry Everybody is fine

Next This beauty -- this actually -- you can barely even see it, I'm sorry 20,000 physicians -- this is actually an earlier one It's actually back in the '30s sometime and I apologize for the terrible view there I've got a color one we'll see later You know, a doctor with a cigarette Can you imagine? What is that supposed to be telling you, you know?

Next You'll see that in color It's a lot easier

This is what Paul Hahn, the former CEO of American Tobacco, said in 1953 after the mouse painting experiments had proved that cigarette tar causes cancer He said, there is no proof He

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wanted to keep selling, and he said loose talk is assailed Loose talk? Researchers trying to save people's lives is loose talk?

I suggest to you, and the evidence will show, that this was a negligent, negligent act This bordered on a criminal act This is not the right thing to do You've got to tell people the truth You've got to say, look, some researchers have found there may be a problem Now, look, if you want to smoke, okay, but we're not going to pull any punches We're going to tell you the facts But, no, loose talk, an act of researchers Blame them It's the wrong response

We're here today to try to make up for some of this stuff that happened.

Next, please. American Tobacco Company in '55 says, the public is generally coming to realize that no real case has been proved against tobacco, and the present state of scientific knowledge on the subject does not justify dogmatic conclusions. Easy to say How many people believed this when they read it? Maybe a lot. Maybe a lot. They say the public is beginning to believe that no case has been proven They're out fighting, fighting the scientists. It's not right. Many scientists

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challenge. Sure There were many scientists on payroll

Next Okay Some documents are more interesting than others, and I've got three to show you. And then, honestly, I'm done. This document came out of the files of Brown & Williamson and it says this -- it's just a piece We don't have time to explain the whole context. But they were involved in a research effort with a British tobacco company called BAT And that tobacco company was doing research, and some of the research is pretty interesting but it wasn't made public until recently

So this is an excerpt from that that said that -- Mr Griffith is a Brown & Williamson scientist who has just been to Europe, just been to England, and he has just talked to the people in England And he says, The scientists with whom I talked were unanimous in their opinion that smoke is weakly carcinogenic -- that means causes cancer -- under certain conditions and that efforts should be made to reduce

But that wasn't what they were telling people at the time In their news releases they were saying no, but their own scientists were

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saying, well, we've got a problem

Next, please You'll see all of that correspondence in a package you will be evaluating

From the British group this important work called a tentative hypothesis of nicotine addiction And this proved back in 1962 that the cigarette industry knew that nicotine was addicting Let me read it because you'll just -- I don't know A few of you are cigarette smokers but it rings so true

A tentative hypothesis for the explanation of nicotine addiction would be that of an unconscious desire to restore the normal physiological equilibrium of the corticotropin releasing system -- whatever that is -- in a body in which the normal functioning of the system has been weakened by chronic intake of nicotine.

That came from the cigarette company's file. Why was that not shown to people so that they would understand that when they took this nicotine in it would weaken them. Their system would be weakened.

We suggest that we will -- the evidence will show that maybe people would want to know if the product would weaken them in that way maybe for

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life. It certainly would be something that you would level with somebody

And we go up to the present, which is Donald S Johnson, who is CEO of American Tobacco, one of the people swearing in front of Congress today or in 1994 that cigarettes were not addictive, did not have problems, and that brings up to date with this long story of denial

Next. The last thing I will talk about is this business of when did Grady Carter file his case I have to talk about it because they've raised it If Grady Carter has four years to file his case and he filed it on February 11, 1995, so the operative date is February 11, 1991, which was four years before that. And the question is, did he have a case before February 11th? And if he had a case, then he didn't file it on time But if he didn't know about his case until after February 11th, then he had four years to file

Well, there is no question that he filed within his four years, because a person who has -- in order to have a case you've got to have a diagnosis You can't file a case on what you think is the case, and you'll be instructed on that

So what is the situation? Well, on the

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4th, which was before, he goes into Dr Yergin and Dr Yergin says he's got something suggestive of a neoplasm Now, neoplasm is cancer, but this was the x-ray So on the 4th he gets x-rayed and Dr Yergin says, well, it's suggestive, but I need to do the tests

The tests are the bronchoscopy where they look down your throat in your lung and they take the tissue and they send it to the lab and the lab comes back The doctor doesn't sit down with a patient and say you've got lung cancer until they do it and they see it because there are other things -- an x-ray is just a shadow So that was the 4th. And move on

This was the 12th when he came back in They had done the bronchoscopy and this is when he had his case. He came back to review the bronch results, finished his CAT scans, but the results are not available At today's visit they're apprehensive. And there is the assessment, adenocarcinoma. It says results are compatible with well differentiated adenocarcinoma of the lung, and that is the diagnosis.

The first time it happened was the 12th, and he filed his case four years and minus one day

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So it was timely filed based on that diagnosis It's just an issue that I guess has come up

Next, please. Just to prove it, here is the letter from Dr Yergin to a life insurance person who says, please be advised that a fiberoptic bronchoscopy performed on Mr. Carter February 12th, tissue proved to be adenocarcinoma That was just a minor thing

I am now done I want to tell you I appreciate the time that you spent with me I know that it probably was a lot longer for you than it was for me because I had all of this stuff to talk about I apologize if I was too loud. I get excited about this issue I think this is an interesting case It's a fascinating case It's not a case that's too big It's not a case that's too small We're cogs We're going to be good cogs

I appreciate your time so much Thank you

THE COURT We will stand in recess until 3 40

(Recess, change of reporters)

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THE COURT Ready?
MR. SHEFFLER. Yes, Your Honor.
THE COURT Mr Ford, bring the jury in, please.
(Jury present)
THE COURT Be seated, please
Mr. Sheffler
MR SHEFFLER May it please the Court.
THE COURT Yes, sir.
MR SHEFFLER Mr and Mrs. Carter, Counsel, Ladies and Gentlemen of the Jury, good afternoon The good news is I'm not going to be as long as Mr Wilner The bad news is, I do have to spend some time reviewing the evidence that we believe you will hear during the course of this trial because Mr. Wilner and I have a very different view of what that evidence will show and what that evidence will be
Now, you may have gotten the impression from listening to Mr Wilner's recitation of the evidence that the case at issue here involves some product liability law that has a lot of different claims, a lot of different issues And he jumped around and talked about statistical evidence from '50s, '80s, whatever. The claim in

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this case is fairly straightforward The claim is that Grady Carter was injured as a result of smoking Lucky Strikes from the period of 1948 until 1972 And the claim, the legal claim is that The American Tobacco Company, as you understand, The American Tobacco Company was acquired by Brown & Williamson, but the real party here is The American Tobacco Company
The claim here that Mr. Carter is bringing is that The American Tobacco Company knew something about lung cancer and smoking that the American public did not It knew something more about the signs of lung cancer and smoking than was out there for the American public to hear. That is his claim It's the failure to warn claim that is at the very bottom of this suit.
All of this talk about statistics and everything else, it all comes down to this. Did American Tobacco, during the period in which Mr. Carter smoked its cigarettes, know more about lung cancer and smoking than was known to the public of which Mr. Carter was a member.
Now, we're going to hear a lot of evidence about that claim. And there's some other claims as well. There's the claim here about

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addiction. We're going to hear some evidence about that. We're going to hear evidence about why Mr. Carter smoked. Why he chose to smoke Lucky Strikes Why he smoked Lucky Strikes until 1972 and then stopped smoking them and changed to different cigarettes Why didn't he quit. Why did he not quit smoking until 1991
And that date is important. The date he quit smoking is important because it is the belief of Mr Carter that is at issue here with respect to this claim of statute of limitations
When did he believe he had lung cancer And the date on which he came to that realization is the date when the clock started running for him to bring the suit. And we're going to talk about that as well
And the final thing we're going to talk about is cancer itself, cancer causation Now, cancer causation is a very difficult issue And it's technical and there's going to be a lot of technical evidence adduced
You saw a lot of statistical evidence from Mr Wilner that he claims his witnesses will tell you about Mr Wilner's claims about this evidence, as you know, is not evidence That's

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what the Court's told us The evidence will have to come from the witnesses
We believe that the proof and the evidence in this case will show you that in the 1960s up through 1972 and even today the cause, the actual cause of cancer, the reason why a cell gets transformed and becomes a neoplastic cell, becomes a cancer cell, the reason for that is still unknown There's research going on today to what causes cancer
Now, we're going to get into that, too, and I'll tell you a little bit as well about what the evidence will show with respect to Mr Carter's cancer Because he had a very specific type of cancer
There are various types of lung cancer. As you probably do know, lung cancer is a number of diseases There's what's called a squamous cell carcinoma and an adenocarcinoma and there's different types of lung cancer And even many of them have different associations with different factors, risk factors. And we'll talk about that and we'll see that evidence at trial.
Now, let me go back to one point, though, that I wanted to clear up And that was

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the issue of warnings You might have got the impression earlier that there was something wrong with the warnings that were on the cigarette packages of Lucky Strikes from 1969 on. You might have heard that there had to be something that was added to that package to make it correct. That there had to be more information than was on the package label

Well, first of all, those package labels, those warning labels were drafted by the United States Congress And as a matter of law, The American Tobacco Company had to put on its packages exactly that language They couldn't vary it That was the law.

And, second, there is no claim in this case that the warning that was on the package '69 forward isn't anything other than adequate There's no claim in this case that The American Tobacco Company should have done something more American Tobacco Company should have put on "don't inhale" or any of these other warnings that were tossed out there There's no claim in this case that after 1969 the warnings on the packages were anything but adequate So what we're focusing on is a period before 1969. What was known by The

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American Tobacco Company, what was known by the public

Now, the evidence on this will come from a number of sources. It will come from witnesses and it will come from documents Documents from the time We talked a little bit yesterday about the importance in looking at this evidence To take yourself out of today's frame of mind and put yourself in the frame of mind of the '40s, the '50s, the '60s, right after World War II And when you see the evidence at that time, it's important to remember that a single study here or a speculation there doesn't establish what the medical community was thinking and believing It doesn't establish what was generally known in the scientific community.

And that's what we're focusing on in this trial. Because the claim is that The American Tobacco Company knew what the medical associations and knew what the medical scientific associations knew, and that that was something different than what the American public knew.

The American Tobacco Company had no more knowledge about lung cancer and smoking than the medical community at the time or the scientific

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community at the time

So what did the scientific and medical community know? Well, in the '40s there were some speculations about lung cancer and a variety of factors Everything from road tar, to electric poles, to cars, exhaust from cars, to air pollution and smoking were considered possible factors, suspects, suspicions, speculation But what was the medical community as a whole saying about those speculations

You will hear and you will see documents from medical journals that establish that the American Medical Association, which is the collection that most doctors belong to, it's an organization that continues today The American Medical Association, the American Cancer Society together reviewed all of the evidence in the '40s and came to the conclusion that there was no reason for doctors to advise their patients who were smokers to stop smoking because of lung cancer That was in 1948, '49 You'll see that evidence There was no consensus in the medical or scientific community about the cause of lung cancer There wasn't even a relationship between smoking and lung cancer at that time We're

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talking about the '40s

In the '50s there were a few studies that started to be published And these studies were epidemiology studies Epidemiology was a new science at that time It was a new type of technology, a new methodology. And like new methodologies, there was a lot of criticism of epidemiology Epidemiology is basically statistics

What you do is you go out and you look at a couple populations and you see there's some incidents here, there's some incidents here You count noses and you see which one has more That's basically epidemiology There's no laboratory science There's no investigation It's just a counting exercise And you can generate lots of statistics from it. And those statistics can be used in many ways, as I'll mention in a few minutes.

But epidemiology wasn't regarded as a true science for purposes of establishing a cause and effect relationship. At least not in the '50s. There were a lot of people who were criticizing these epidemiology studies People like the National Cancer Institute, scientists at

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the National Cancer Institute were writing that epidemiology is good to kind of guide us in ways to look for further research, but it doesn't make the whole thing That's not the picture We need more research We need more evidence We need more data That's what they were saying

Now, people who were writing these studies were saying we have shown a relationship, we have shown a link So you had a controversy developing And in the 1950s this controversy started out kind of small, but it continued And the medical and scientific community were debating, were debating whether or not these studies can show a relationship or whether or not you really needed laboratory evidence And laboratory evidence was conducted

What they did was they tried to induce lung cancer in studies with animals with whole smoke They used whole smoke, induced it into the animals, expecting to find cancer If so, that would give confirmation to some degree to the epidemiology studies It was a good hypothesis Epidemiology says that this relationship might be there, let's check it out in the lab

Well, they did NCI did it Other

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researchers around the country did it And they couldn't produce any lung cancer Whole smoke didn't produce lung cancers in animals

So then they started scratching their head and saying, well, we need to look at this further And the debate went on As more and more studies in epidemiology came in, the debate intensified And the studies were reported in journals and so was the controversy

You'll see in this case there will be a study reported, an author makes a claim, I've shown a relationship The next month, next year, next journal says, wait a minute, that's no relationship at all Even the same authors of these studies will have retracted their words after a certain period of time has gone by Some people will come up and say, I think there's a relationship Years later they come back and say, you know that relationship I thought was between cigarette smoking and lung cancer, I'm not so sure You'll see that, too, in this trial.

In fact, some of the ones that plaintiffs' counsel had up on the screen there, we'll see how they retracted some of their statements about the relationship between lung

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cancer and smoking in this trial through the evidence

Now, as this controversy continued through the '50s and up through the '60s, the Surgeon General became involved. Surgeon General at the time was a Dr. Luther Terry. And he wanted to look at the evidence of this controversy He wanted to look at all the evidence Because there was more and more of these statistical studies that did show this association.

Now, in 1962 Dr Terry put together a world class panel of experts to review the scientific evidence This panel was called the advisory committee to the Surgeon General And as a result of their review of all the literature, of all the controversial literature out there, reviewing the statistical studies, reviewing the literature on toxicology, which are the animal studies, they came to a conclusion, a number of conclusions

They looked at a lot of different issues of smoking and health and they published them in a report, the first Surgeon General's report in 1964 It was a very important report because it was a public health document One of the first

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public health documents that was given the publicity that these reports were

And as a public health document, it was searching for a way to define scientific terms in common language And that was one of its problems Because the debate in the science was, can a statistical association, which these studies definitely showed, but can that statistical association be said to be caused in the absolute sense, in a scientific sense Do you have enough, when you have a statistical association, to say, yes, this is the cause, the absolute cause, the scientific cause. That's what they were wrestling with

But they also knew that to try to describe this for the common public is difficult. Unfortunately, you, for example are going to have to hear all this description during the course of this trial because it's an important part of the trial

But the Surgeon General's committee wrestled with how to define these terms And I'd just like to read you a couple passages, if I may, from the Surgeon General's report. They are not long. First one is from the Forward, written by

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Dr. Terry himself. Surgeon General, 1964. He writes, Few medical questions have stirred such public interest or created more scientific debate than the tobacco health controversy That's 1964. The debate was continuing up until this report

He goes on to say, The interrelationships of smoking and health undoubtedly are complex The subject does not lend itself to easy answers But answers they had to come up with Because it goes on to say, Nevertheless, it has been increasingly apparent that answers must be found So what did they do? How did they resolve this controversy? How did they resolve this issue?

Well, the first thing they did was they said, when you look at statistical associations – and that's what these studies were showing That's what most of those slides that you were seeing there, they were statistical associations, epidemiological associations, statistics Statistical methods cannot establish proof of a causal relationship in an association That's precisely what people were reporting

They were reporting this association

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based on the statistics And the Surgeon General's committee says, you cannot establish proof of a causal relationship in an association by statistics alone The causal significance of an association, that's the statistical field, is a matter of judgment which goes beyond any statement of statistical probability So they said, statistical evidence is nice, it's good, it points the way for further research, but it can't in and of itself show causation

But they still had the problem of communicating this to the public And they said that there were various meanings and conceptions of the term "cause" were discussed vigorously at a number of meetings of the committee and subcommittee. So they debated whether they were going to use the word cause, not use the word cause, back and forth

Eventually what they decided was we're going to use the word cause because it's the one in general usage in the public. So it's the one that will convey that there is a significant effectual relationship between an agent and an associated disease. So they said, we'll use the word cause in that context. But they hasten to

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say, It should be said at once, however, that no member of this committee used cause – and they got it in quotation marks – in an absolute sense in the area of this study

So they were saying statistical association for public health purposes we can use the word cause, but it's not a scientific cause It doesn't identify the actual scientific cause. That awaits proof. It awaits proof today.

We're going to bring a person today into court this trial to testify to you about what cancer research is doing today. His testimony will be on molecular biology. And molecular biology is something I don't understand I'm not even going to try to summarize it for you, but I do think that what his testimony will make clear is that there's an awful lot that's unknown about what goes on in the innerworkings of a cell, what goes on in the DNA, what goes on in the genes of the cell on a molecular basis that we know very little about

We only have identified five percent of the genes in a human cell Ninety-five percent we don't even know what they do or what they are So we think, or science believes that genetic events,

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disruptions, mutations, are the absolute cause, the scientific cause of cancer, of lung cancer But we don't know what they are And we certainly don't know what causes them. What we do have are statistical associations

Now, the Surgeon General reviewed -- in addition to lung cancer, it also reviewed issues with respect to smoking behavior And you heard in Mr Wilner's description of what he thinks the evidence will be, you heard some reference to the fact that the Surgeon General found that cocaine was not addictive Well, the Surgeon General's report – this is the nice thing about evidence Evidence is what you can see and hear and read. The Surgeon General's report addressed addiction in this volume, 1964

This is where the Surgeon General came to the conclusion that smoking was not an addiction, but a habit And in this volume you'll have a chance to sit down and read it. Surgeon General never said that cocaine is not addictive in 1964. That's not in this report. And you'll have a chance to check that out for yourself.

What the Surgeon General said, and let me read it to you, is that the evidence indicates

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this dependence to be psychogenically of origin. He's talking about smoking. In medical scientific terminology the practice should be labeled habituation to distinguish it clearly from addiction, since the biological effects of tobacco, like coffee and other caffeine containing beverages, are not comparable to those produced by morphine, alcohol, barbiturates and many other potent addicting drugs That was the Surgeon General's report in 1964 That was the conclusion of this blue ribbon panel

There was no debate All right. There was no debate about the definition of addiction and whether or not smoking was an addiction back in the 1940s, '50s and '60s, up through the time that Mr Carter smoked cigarettes That wasn't a matter of controversy It was controversy over the lung cancer and smoking relationship, but there was no controversy over that And that the evidence will show

And why is that? The reason why addiction could not be properly applied to smoking during this period was that the definition of addiction was very, very succinct and complete You had to satisfy certain criteria to be a drug

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of addiction And I want to show you, if I can, just quickly This is from the Surgeon General's report, like I said, from 1964 It's big enough for everyone to see, I hope And you see the first part of this definition says drug addiction, drug habituation

First part says, drug addiction is a state of periodic or chronic intoxication produced by the repeated consumption of a drug Habit is a condition resulting from the repeated consumption of a drug In other words, coffee -- you drink coffee every morning It could be considered a habit You eat chocolate a lot, every day, it could be considered a habit The habit is a desire, not a compulsion An addiction is an overpowering desire or need or compulsion. The Surgeon General is making a distinction.

We'll go through these during the course of the trial and we'll show how the Surgeon General went through each one of these factors and each one of the habit factors and compared what the effects of smoking were and where did smoking fall. It fell at the habit. That was the Surgeon General's conclusion And there was no debate about that at this time

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Now, Mr. Wilner talked about some research, some research that was done, I'm not exactly sure where, but it was some research apparently about cortico something or others that do something or other And I'm not exactly clear what he said I've never seen this research. It wasn't part of American Tobacco's research, certainly And unless this research he's referring to found that nicotine caused intoxication, it wouldn't have mattered to the Surgeon General because you have to have periodic or chronic intoxication. Smoking cigarettes has got to make you drunk

Smoking cigarettes doesn't make you drunk and no research is going to conclude otherwise So it could not fit the definition of addiction Now, it's true that over time definitions were changed, definitions were broadened and over time there was a redefinition of addiction In fact, it's been redefined many, many times by many, many people Until where today it's unclear really what addiction means at all in the medical sense

We're going to hear from an expert in this case who we'll call at the trial, a Dr John

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Thompson, who is an expert psychiatrist And he will address the issue of addiction for you Now, psychiatry, as you know, is a study of human behaviors, addictions, dependencies fall within that field

Dr Thompson is the only psychiatrist who will testify at this trial And he'll tell you what addiction means today, what it meant before, what's the differences And he will discuss that in some detail and he will show you why it is that the definitions of addiction, when they are stretched really wide, like some people would have you do, cover so many behaviors, so many substances, that it almost becomes meaningless.

Dr. Thompson believes that the better word is dependency. That's the word that is used in psychiatric terminology. And dependency as he describes it only occurs when a person's use of a substance causes him significant mental distress, significant mental harm. And that's not just Dr. Thompson's view or opinion, that is the basic view of the American Psychiatric Association.

That definition does not apply to Mr Carter when he was smoking Lucky Strikes. He

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liked smoking Lucky Strikes. He enjoyed it. Definition of addiction, even today, doesn't apply to Mr. Carter. Or if it's made and stretched to apply to Mr Carter, it applies to everybody It applies to everybody who smokes It applies to everybody who was a former smoker.

According to the 1988 Surgeon General's report, at that time there were 88 million, excuse me, there were 40 million smokers 40 million people were still smoking cigarettes And at the same time there were 40 million people who had quit smoking cigarettes 40 million Half and half

Today, in other words, the numbers are a little different There's more former smokers than smokers today But even using the 1988 Surgeon General's terms, the 40 million smokers who under this stretched definition of addiction would be considered to be addicted to nicotine quit And 90 percent of those quit without any medical assistance, without any intervention, without any aids or without any help So even under this new, stretched definition, addiction -- one thing is clear -- addiction does not mean you can't quit if you want to 40 million people are

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evidence of that And so is Mr Carter He smoked cigarettes for many, many years, and he quit And he hasn't had a cigarette in the last five years

Now, getting back to this, the evidence on the controversy and what is known to America You'll hear that American Tobacco knew of the controversy, but you'll also hear that the American public was made fully aware of this controversy Remember, I told you before that for a failure to warn claim, that's the claim that's being brought by the plaintiffs, they have to show and prove that the American Tobacco Company knew something about this smoking and lung cancer that the public did not know.

Well, the public was kept well informed of the entire controversy. In the '50s smoking was a very popular habit. Dwight Eisenhower, the president, smoked. And he inhaled. So it was a type of thing that was newsworthy It was the type of thing that would make front page headlines when a study came out saying, I've got a relationship, I think I have an association, smoking and lung cancer are linked. Big news

Now, there were criticisms of those

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studies, as I told you. There were people who said, let's do more research before we start making these claims. That's not newsworthy, that's buried in page ten of the story The story is the headline, Smoking Linked to Lung Cancer And you'll see throughout the decade of the '50s, story after story of smoking and its relationship to lung cancer, according to this article or according to this author

You don't see much of the other countervailing evidence The other side of the debate is not really well represented because who's going to say, well, we need more research Who is going to print that, that's not newsworthy

Now, Mr. Carter was exposed to this He was exposed to these stories in the press In fact, Mr Carter will tell you that throughout his life, beginning in the '40s, he used to subscribe to this magazine, The Reader's Digest And in The Readers Digest there are a number of articles throughout the '40s and '50s that are very antismoking in terms The Reader's Digest, for all of its existence, has been very against smoking And they published articles summarizing

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almost every study that came out negative to smoking

For example, in this one, December 1952, second article in the journal, Cancer by the Carton Indictment of Tobacco This is the type of thing Mr Carter saw This is the type thing he was reading And the publicity increased And it increased throughout the '50s And it increased throughout the '60s until the 1964 Surgeon General's report was issued. And that was a huge public display, the 1964 Surgeon General's report.

And this is from The Florida Times-Union newspaper, January 12, 1964 Cigarette Smoking Held Grave Hazard to Health in U S This is what the public was hearing They were hearing what was being done in the medical and scientific community This was newsworthy stuff The public was being told. But Mr Carter had access to these newspapers. In fact, Mr Carter would tell you that he did read about this publicity, about the Surgeon General's report. He read about the Surgeon General's report and he discussed it with his colleagues at the FAA, his fellow employees.

After '64 the evidence then stopped. It

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became more aggressive Once the warnings went on the packages, there still was more public denouncement, more public warnings and publicity on the radio I don't know if you remember the slogan, I do, you mind very much if they smoke It's a matter of life and breath Those slogans were broadcast over the radio Television was running warnings, spots, telling people the dangers associated with smoking in the public health service

I want to show you one of those This is from a cancer society It's of a television warning that Mr Carter remembered. I mean, even years after the fact he can remember this warning This was back in, I guess, 1968 or '69, something around there And it's a spot that had the actor on the Perry Mason show -- very popular show back then Perry mason was a courtroom drama It's kind of apropos for the situation But he was always opposed by this one prosecuting attorney who always lost And the guy's name in the show was Burton His actual name was Tallman. And I'd like to show you the spot that he made I think that you'll probably remember If I can turn this thing on

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(Videotape being played)

MR SHEFFLER That was the type of warning Mr Carter was getting during the period that he was smoking Lucky Strikes The type of warnings that Mr Carter was getting but disregarded He got warnings, as well, from people who were very close to him Throughout his life he was warned by his wife, Mrs Carter, about the dangers of smoking His son Larry went to school to become a chiropractor When he would come home, he'd warn Mr Carter about the dangers of this habit. It got to a point where Mr Carter didn't just want to hear about it anymore So Larry, after a while, he quit But Mr. Carter wasn't interested in learning more about the dangers He knew full well the dangers

His wife used to cut out newspaper articles and leave them on his desk. Newspaper articles of the dangers of smoking; the types of articles that were being published at this time. She used to leave them on his desk for him to read, but he didn't. American Tobacco Company couldn't have told Mr. Carter anything he didn't already know about smoking and lung cancer at that time. Not anything that was known to the medical

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community at least. He knew because it was public and it was in the media, and you'll hear testimony about that.

Now, there was one -- I have to mention one thing that Mr Wilner was talking about earlier about these warnings Again, don't forget, 1969 that warning, that U.S. government warning was what had to be on the packages. We couldn't change them. That was it. But I got the impression he was trying to suggest that there should have been other warnings

The one time he said that a good manufacturer would tell its consumers of everything that's in its product. Well, I'm not sure that manufacturers in the '60s and '70s or even today, as with respect to many, many manufacturers, even know everything that's in their product.

Do you know that there are 4,000 different chemicals in cigarette smoke? 4,000 And that's just now today we have identified 4,000 chemicals in cigarette smoke If we were to put that on the side of a package, the package would be too big to put in your pocket I mean, and who would do anything with that information? I mean,

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one of the things that Mr Wilner showed you was this idea about polyaromatic hydrocarbons being in cigarette smoke and that being a big danger We should tell people that polyaromatic hydrocarbons were in cigarette smoke

I didn't write them all down. That was the first one in the list Remember he showed you that list about the the different things in the cigarette smoke He said he'd get to it later First one on there is what I wrote down. But do you know polyaromatic hydrocarbons are in grilled hotdogs and charcoaled steak, in almost anything that you grill Grilled fish has polyaromatic hydrocarbons It's a natural byproduct of the process of combustion.

Now, certainly Mr. Carter was not going to make his decision about whether he was going to smoke or not on the basis of whether or not there were polyaromatic hydrocarbons in cigarette smoke. He was going to make it on the basis of what was important to him. And what was important to him was, what is the disease process that's associated with smoking. He knew about them. He knew that lung cancer was associated with smoking. He saw the Tallman video. He saw lots

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of material like this during his lifetime.

We'll talk about some of that, but I want to turn for a minute to the medical issues. And I won't spend a lot of time on this because, I'll be honest with you, it would be better coming from the witness than coming from me Somebody who knows it well and can explain it well. But there's a couple things I would like to say.

First of all, this evidence about statistics and statistical evidence and this epidemiology evidence, remember when you hear statistics that there's a lot of ways to interpret them I mean, it is a statistic that ten percent of smokers will develop lung cancer. That is a statistic and it is out there And there are studies that suggest that But turn that statistic around and what it says is, 90 percent of smokers will not develop lung cancer A statistic also out there is ten percent of lung cancer occurs in nonsmokers That's also out there And you can apply statistics to other behaviors

Now, Mr Wilner went through a bunch of statistics and said, look at smoking compared to getting struck by lightning or getting blown up in

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a nuclear power plant or falling off a motorcycle The point about statistics is that it's like in the eye of the beholder. Okay There are statistics that you can generate up about smoking that sound awesome, but you can generate those same statistics about dying. You can generate those same statistics about being 10 to 12 pounds overweight. Those same statistics

Early mortality that Mr. Wilner was talking about. You can look at being 10 to 12 pounds overweight and find the same statistics Statistics are statistics.

If you add up all the different statistics, all the different percentages that are attributable causes of lung cancer; for example, you know that smoking has a statistic and there's a certain percentage attributable to smoking There's a certain percentage of lung cancer attributable to Radon You know, Radon, the gas that comes up from the basements and the cellars of homes and houses. Radon gas Certain percentage of lung cancer is attributable to that. There's a certain percentage of lung cancer is attributable to occupation, to jobs, where you work. Certain percentage is attributable to

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living in certain hot spots of the country.

There are areas in the country — and nobody knows why — cancer is more prevalent. And lung cancer is more prevalent. Duval County is one of those areas. You can plot it on a map and you can see where the National Cancer Institute has identified certain points, certain points in the country that are cancer hot spots Duval County is a cancer hot spot for lung cancer. And you'll hear that evidence in this trial

But, anyway, there's a certain percentage of lung cancer due to hot spots There's a certain percentage due to high-fat diets It's true High-fat diets have been associated statistically the same way smoking has been associated statistically with an increased rate of lung cancer And a certain percentage of lung cancers are attributable to prior lung diseases, like severe infections, like pleurisy It causes scarring of the lungs And a certain percentage of lung cancer is attributable to that And then there's others I mean, air pollution, there's a certain percentage attributed to air pollution It's small It's not like these others But there are a lot of other

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factors out there that have a percentage statistically associated

If you add up all those percentages, you get to way over 100 percent And why is that? Because it's statistics And that's just what statistics do, statisticians do.

But there is one statistic that I would like to mention to you that you will hear testimony about in this trial, and it's important. And that statistic deals with declining risk upon smoking cessation. One of the warnings in the '85 amendment to warnings is, Quitting now greatly reduces your chances — well, quitting now greatly reduces your risk of health hazards from smoking

And it's based upon the same statistical evidence that Mr. Wilner was telling you implicated smoking. Those same studies that showed the dose-response and everything else he was talking about, those statistical studies, those same statistical studies show that when a person quits smoking, after 10 to 15 years his risk of lung cancer is like that of someone who never smoked

Now, Mr Carter smoked Lucky Strikes up

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until 1973 If he had quit in 1973, 10 to 15 years later, 1983 to 1988, his risk would have been that of a nonsmoker But he didn't quit. He quit smoking Lucky Strikes. He changed brands. Brands that are not in this case Mr Carter knew about the declining risks when you quit smoking cigarettes. His son Larry told him about it, as well as he saw it on the cigarette packages in the 1980s

Now, this is not to say that Mr Carter is a statistic And I wouldn't do that He's not a statistic And you can't use statistics to diagnose a disease You can't use statistics to come to a conclusion of a cause in an individual Statistics don't work that way They apply to huge groups of people Mr Carter is an individual Mr Carter had a specific type of lung cancer And Mr. Carter's type of lung cancer was a bit unusual. It was unusual for a number of reasons.

First of all, I don't know if you recall, you remember the ciliated cells in that slide that was shown to you earlier You had the big columns of ciliated cells Well, those cells -- and then I think Mr Wilner went on to

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say, those cells in a smoker become flattened and then they become cancerous Remember he said something like that Well, the point of all that is, it's thought that smoking-related cancers, or those cancers associated with smoking, occur in the area where those ciliated cells are Okay Those cells with little hairs on top Those ciliated cells exist in the main air tubes of the lung, and only there In the main -- they call them bronchi, but they are the main air tubes in the lung

Now, as the lung goes out, you know, you got your windpipe, it comes down and branches off and goes to each lung Then it keeps branching It's like a tree. And it just keeps getting smaller and smaller and smaller and it goes way out there And eventually it gets into these little tiny air sacs where the air is exchanged with the blood.

This will all be explained to you. We're going to have a witness here who will explain in detail the anatomy of the lung and show you how this happens.

Now, most smoking-related cancers, it's believed that they occur in the main bronchi, the

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first few branches And they arise from those lining cells Mr. Carter's cancer, though, did not start there It started in the periphery of the lung And it was very unusual because of that.

And the testimony that you'll hear to establish that Mr Carter's lung cancer was a peripheral lung cancer comes from Dr Gamba. Dr Gamba is a radiologist, is a Board-certified radiologist. He practices at Baptist Hospital He reads x-rays every day That's what he does for a living. He will come in here and he will go through Mr. Carter's chest x-rays with you And he will show you on the films of Mr Carter why it is that his lung cancer was in the periphery of the lung, not in the main airways

And you will also hear from another doctor in this case by the name of Dr Gary Pearl, a Board-certified pathologist Now, a pathologist is the doctor that looks at the tissue, the cells of cancer or healthy tissue or diseased tissue, he looks at it under a microscope And looking through the microscope he's able to see the individual cells and he comes to a diagnosis of the disease process That's what pathologists

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do And Dr Pearl will tell you that when he looked at the cells of Mr Carter, he found that he had a specific type of lung cancer called adenocarcinoma And you'll hear that term a lot in the course of the trial

Adenocarcinoma is the type of lung cancer that occurs most frequently in nonsmokers Adenocarcinoma in the periphery, that's putting those two together, a peripheral adenocarcinoma -- I told you this gets technical, but bear with me A peripheral adenocarcinoma is not associated with smoking It's associated with scarring

Remember, I told you before there's certain previous infections that can cause scars And those scars are associated with cancers. And peripheral adenocarcinoma is associated with scarring Now, did Mr. Carter have previous lung infections? Well, he had a couple bouts of pleurisy.

Also, adenocarcinoma of the lung is the one that's most associated with high-fat diets. Excuse me Mr. Carter, throughout his adult life, had problems with high cholesterol He had a high-fat diet. He was recommended to go on a low-fat diet a number of times, but as the

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evidence will show he wasn't quite good at following his low-fat diet. So he came on and off. And when the chocolate chip cookies came, were passed around, he kind of put the idea of a diet away for a while We'll talk about that in a minute

But, in any event, the proof will show that Mr. Carter did have a peripheral adenocarcinoma associated with scars, but not associated with smoking The proof will also show -- and this will come from the molecular biologist I told you we're bringing He will talk to you about carcinogenesis That's his specialty, cancer research

He'll tell you where that research is today He'll tell you the millions of dollars that's being spent by the NCI, American Cancer Society and all kinds of people trying to research the molecular basis of cancer. He'll also tell you that we don't know a lot about the molecular basis of lung cancer We know very little We don't know what it is What mutation is necessary to cause a cell to become cancerous We don't know that

He'll tell you that there's been some

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researchers who have suggested that a couple mutations that have been identified are commonly found in the cancers of those people who have cancer associated with smoking Two mutations And he'll tell you that he looked to see -- he did the test necessary to look at the molecular genetic material in Mr Carter's cancer to see if those mutations existed And when he looked, he found they didn't exist. They were not there. I think the proof will show, Ladies and Gentlemen of the Jury, that there is no association between the specific type of lung cancer that Mr Carter had, this peripheral adenocarcinoma, and his smoking of Lucky Strike cigarettes.

Now, there is another type of evidence that I want to go over with you briefly I know it's late in the day. Bear with me and I'll try to summarize it as much as I can. You will hear this evidence during the trial, though. And I do think it's incumbent upon me to give you some preview of what you're going to be hearing.

Third type of evidence deals with Mr. Carter himself. His decisions Why he smoked, why he quit in '91, why he didn't quit before. And a lot of this evidence comes from

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Mr. Carter and Mrs. Carter.

We were able to ask them some questions before trial in what's called a deposition. And they told us about some of Mr. Carter's smoking behavior, some of his knowledge about smoking and its risks. During the course of the trial you'll hear some of that testimony And I believe you'll hear Mr Carter and Mrs Carter both testify as well

Mr Carter as a young boy lived on a tobacco farm He harvested tobacco, he cured it and he got it ready for sale As a young man he -- his family moved to Jacksonville and he became a part of the family business which was selling cigarettes And he sold cigarettes and he was around cigarettes

So Mr Carter, you know, tobacco and cigarettes were not something foreign to him He started smoking at age 17 to be one of the crowd, at least that was his testimony. And he continued smoking And he smoked Lucky Strikes because he liked them He said he liked the taste He preferred Luckys He liked drinking -- he liked to have a Lucky Strike when he had a cup of coffee in the morning

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He used Lucky Strike cigarettes and smoking as a reward It's like the time he told us he was -- or Mr Carter was part of the FAA and he was an air traffic controller A stressful job some people would find, but he found it to be challenging. He found the stress to be enjoyable He enjoyed his job He loved it

He told us one time that he had to guide 35 airplanes through a thunder storm and land them all safely. And he accomplished that feat and he was very proud of it. And after it was done, he leaned back in his chair, and to celebrate he lit himself up a Lucky Strike and smoked it because he liked it. It was a reward He enjoyed smoking.

Now, we talked a little bit about addiction. And I told you Dr. Thompson -- we'll talk about that. But addiction is really not the issue. It's not really the issue in this trial. Addiction, dependency, habit, you can call it whatever you want. The question is, what distinguishes between people who quit smoking and people who don't quit smoking. What is the thing that distinguishes between those two

It's not the addiction label because

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that label applies to all smokers, the 40 million who smoke and the 40 million who quit. Or it applies to no smokers So it's not the label of addiction that we're really concerned about here. What is it that distinguishes between people who quit smoking and people who don't.

Dr Thompson will tell you, maybe it's self-evident common sense, but nevertheless it's true, the one thing that distinguishes between people who quit and people who don't is motivation The people who quit smoking are the ones who truly are motivated to quit

It was put very well by this doctor down here in Florida, Carolyn Schlede, Director of Smoking Cessation Program And this is published in the Journal of the Florida Medical Association And what she said is, Motivation is the key The person has to want to quit more than he or she wants to continue I don't know how much they paid her to come to that conclusion in terms of research grants or how much research it took, but I do know that it's pretty self-evident common sense that a person who doesn't want to quit smoking or doesn't truly want to make the effort to quit will not do so, and a person who is

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truly motivated will And that's the issue in this trial

What was it that was going to motivate Mr Carter to quit smoking? The plaintiffs say it was a warning Plaintiffs say that a warning by The American Tobacco Company would have done it That would have been enough to motivate him to quit. They have to say that for their claim to succeed But the proof will show that Mr Carter knew well the risks of smoking and it didn't do anything in terms of changing his motivation

There was an occasion when Mrs Carter was asked about her discussions with Mr Carter to try to motivate him She was asked, what did you do, because she was concerned. She was very concerned about his smoking And she was asked, what did you do. And I want to show you testimony she gave, because I think it's very explanatory of this whole motivation question.

This is at her deposition that we took before trial. This is part of the testimony that you will hear. And it's Mildred Carter. It's Mr. Carter's wife.

The question is asked, Do you know of anything that you could have done or showed Grady,

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Mr. Carter, that would have persuaded him to quit?

I think I tried some of everything in the world that I could think of that I thought would even remotely change his mind or maybe get him to try one more time or, if you want to put it that way, a serious effort, but nothing worked.

So you don't know of anything?

I don't know of a thing.

Now, if Mrs Carter couldn't persuade her husband to quit smoking, she couldn't motivate him to quit smoking, what could The American Tobacco Company have said that would have motivated him to quit smoking during the time he was smoking Lucky Strikes

Mr. Carter told us himself about some of his motivation to quit. And every once in a while he would make an attempt to quit when he was pushed by his wife, or when his friends told him, let's do it on a dare, or when some new gizmo came on the market. You know, stop smoking with these kind of fancy filters type of thing He'd buy it, he'd try it, he'd maybe quit for a week or so, but then he went back. And why? Because he didn't really want to quit

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When the FAA, where Mr Carter was the manager, instituted a smoking cessation clinic, it's a free clinic, it's for all the employees at the FAA, he didn't go He set it up He allowed it to be, have the facilities to run the clinic, but he didn't go. When he was asked why, he simply said, Because I didn't want to quit He did not want to quit smoking It wasn't that he was addicted It wasn't that the label addiction prevented him from quitting He didn't want to He wasn't motivated.

There was an annual Smoke Out that occurred You've probably -- well, there's a Great American Smoke Out that the American Cancer Society runs every year People are supposed to stop smoking, if you're a smoker, for a day And it's something that Mrs. Carter wanted Grady to try to do

Mr. Carter was asked about that in his deposition. Here's the testimony of Mr Carter

Okay. So from 1983 to 1991 you never participated in the Great American Smoke Out; right?

That is correct.

You know it's an annual event; right?

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Yes.

And the reason you never participated in it is because you didn't want to stop smoking; right?

That's correct.

He didn't want to stop He wasn't motivated to stop.

Mr. Carter was advised by his physicians to stop smoking and they also advised that because of his high cholesterol to go on this low cholesterol/fat diet. And from time to time he did diet But from time to time he didn't And the times he didn't were more, much more than the times he did. He knew that he was at risk because of his high cholesterol for heart disease, heart attacks, and the like He knew that But he couldn't keep on his diet And why is that? Because he wasn't motivated Was he addicted or is he addicted to fatty foods? According to some definitions maybe he is But is that why he didn't -- he can't stay on a low-fat diet? It's because he's not motivated

Now, Dr Thompson will explain to you that the reason why Mr Carter quit in 1991 and didn't quit before was because Mr Carter was

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using, before that time, a common psychological tool A tool that we all use when we're faced with risky behaviors that we want to engage in

Some people like to ride motorcycles That's risky. But they convince themselves, it's not going to happen to me I'm not going to get in the accident Some people have hypercholesterol and it's risky not to keep on your low-cholesterol diet, but you rationalize that by saying, it's not going to happen to me I'll take care of that diet tomorrow. I'm going to be okay. It's going to be the other guy. This is a common thing we do all the time

Mr. Carter applied that same psychological tool to his smoking throughout his life. And especially in the time he smoked Lucky Strikes. He said it wasn't going to be me. It's not going to happen to me. It's going to be somebody else And I think the rationalization that Mr. Carter used is best explained in the deposition testimony of Mrs. Carter again.

Again, this is the deposition of Mrs. Carter that you will hear during the trial of this case.

Now, did Grady acknowledge to you in

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these discussions that he knew that he should quit smoking not just because of his promise to you, but because of his health.

The answer: I don't really believe that it was anything that he would say based on health as much as it was that he knew that he had made a promise to me and he knew how much it bothered me for him to do that. And so I don't really think that he thought about it healthwise a whole lot because he, again, was one of those people who thought I can do this and nothing bad is going to happen to me It's always somebody else

Mrs Carter, as well, knows Mr Carter, perhaps, better than anyone else And that was her opinion of what Mr Carter was doing and why it was, with this health information, with all the news articles she was cutting out and leaving for him, with the warnings from his son, his doctors, with all of the video warnings, all of the TV warnings, all the information in the newspapers, all of this information about health and smoking he disregarded The reason was he rationalized it He rationalized it away It's going to happen to somebody else And it worked It worked until February or the end of January of

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1991

At that time Mr Carter realized -- believed he had lung cancer He was coughing up blood He looked up in the book the symptoms of lung cancer He convinced himself he did have, indeed, lung cancer And he stopped smoking And he's never had a cigarette since. Why? The rationalizations won't work. It was too real The motivation is high

It's the same way for the person who rationalizes away his failure to stay on a low-fat diet. I'll diet tomorrow. It's okay It's not going to happen to me. First time he gets the signs of a heart attack or, worse yet, if he actually experiences one and survives his motivation is high. His motivation will be very high to stop. And at that time he will go back on his diet.

Now, Mr. Carter, as I told you, became truly motivated to quit when he believed he had lung cancer. And that is why he's quit and that is why he's remained abstaintive from smoking until today.

The date that he came to that realization or the date he came to that belief is

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a very important date for the purpose of the trial. You've heard a couple references to it already And the testimony on this date is important. It's not the date of diagnosis. There's nowhere in the statute of limitations law that says date of diagnosis is a triggering event That's not in the law The law says when the person who is injured knows or reasonably believes he was injured He's got four years to bring his claim If he doesn't bring his claim before the four years has run, he can't bring it That's the Florida legislature That's not the rule of Judge Davis, not the rule of the lawyers That's the Florida legislature If you don't bring your claim within four years after you know you were injured, you can't bring it

Mr Carter believed -- he realized he was injured He thought he had lung cancer He believed it He quit smoking as a result of it on or before February 5, 1991

After that he thought about suing, he thought about bringing a lawsuit, but he didn't until he saw an advertisement in the newspaper that was put out to get plaintiffs to come -- to get people to come in to sue tobacco companies

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That's after Mr Carter saw that ad, he called up the firm Mr Wilner is with and his case was filed immediately, thereafter Unfortunately, by that time it was February 10, 1995, well after four years from the time Mr Carter realized and knew he had lung cancer

In sum, I believe the evidence will show in this case that although Mr Carter was well aware of the risk of smoking, he did not quit smoking until 1991 because he was not motivated to do so And there was nothing that The American Tobacco Company could have said There was nothing that anyone could have said that would have changed his motivation until 1991.

Now, Mr Wilner said that it was, it was -- there was no claim in this case that American, Brown & Williamson is blaming Mr Carter for his actions. That's actually -- that's absolutely correct Of the many things he said, that is absolutely correct. There is no claim by American Tobacco, Brown & Williamson Tobacco that Mr. Carter did anything wrong by smoking cigarettes. Mr. Carter made a choice.

He made a choice to disregard the advice of his doctors when they told him to go on the

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low-fat diet. He made a decision to disregard the advice of his doctors when they told him to quit smoking. And that was his choice. That was his decision. In America we have the right to make such decisions. Cigarettes are legal products and they are legally manufactured. They are -- they do carry the package warnings in compliance with the U S Congress's law and they are legally sold in all 50 states

Now, some of us may disagree with Mr Carter's decision to smoke cigarettes knowing what he knew, but that was Mr. Carter's decision. And it was Mr Carter's right to make that decision and we must all respect it.

Thank you very much for your patience It's late in the afternoon I apologize I think I did keep my promise to be shorter than Mr Wilner, probably longer than you wanted, but you will hear a great deal of evidence in this trial It is extraordinarily important to all of us We all take this very seriously, as I'm sure that you do, too And I deeply thank you for your attention and I thank you for the attention you're going to give to the evidence in this case and to the care you will give to your deliberations in

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this matter Thank you very much

THE COURT Ladies and Gentlemen, there's some matters I need to take up outside of your presence with the attorneys before you leave today, so I'm going to ask you to retire to the jury room for just a moment, if you would, please

(Jury absent)

THE BAILIFF All secure, Your Honor

THE COURT I'm sorry?

THE BAILIFF Secure

THE COURT All right Please be seated

Do they have a verdict? Is that a verdict? Didn't they ring the buzzer?

THE CLERK. I think somebody leaned on it.

THE COURT Let me see counsel without the reporter at side bar.

(Side bar, Court and counsel)

THE COURT. Gentlemen, you-all will return to counsel table.

MR. PRICHARD Sorry

MR MAXWELL Sorry. I forgot we didn't need to do this at side bar.

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THE COURT Right. The jury is out. It came to my attention before opening statements, and I shared this with counsel for both parties, that juror number seven, Mr. Richard Prisock, expressed concern to Mr Ford, our bailiff, during one of the recesses that the trial and its length was likely to work an economic hardship and that he could not afford to be here and that it was a problem for him I understand now that with that information counsel for plaintiff and perhaps counsel for defendant want to be heard

MR MAXWELL Yes, Your Honor. The plaintiffs would move to dismiss juror number seven, or Mr Prisock, from the panel Our concern is that he was specifically asked questions about potential hardship in the case and did not indicate that he had any hardship The fact that he is now making comments about hardship gives me concern that perhaps his responses to our other inquiries may not have been as direct or as forthcoming or as candid as we needed him to be with us

As an additional ground that is unrelated to this, I have noticed today during opening statements that Mr. Prisock was napping

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during both the statement given by plaintiffs and the statement given by defendant, and that I would move on those grounds as well

MR PRICHARD Your Honor, my first request would be that this motion -- the sensitive matter of a juror be conducted in camera, if the Court would permit

MR MAXWELL No objection to that, Your Honor

THE COURT All right Then you mean the argument in its entirety or --

MR PRICHARD No, sir, with respect to this juror and Your Honor's contemplating further inquiry of Mr Prisock, for example

THE COURT Oh, okay.

MR. PRICHARD If all you're looking for now is if we're objecting to his exclusion or not, I can give you that.

THE COURT All right. I'd like to hear your position on that, first of all.

MR. PRICHARD Yes, Your Honor. First of all, we would object to removing Mr Prisock from the jury that was only struck this morning just before noon after a day and a half of inquiry by counsel for both sides. I'm not sure of the

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tenure or the nature of the severity of the comment to Mr Ford, the bailiff. Certainly anybody who has a job who has to sit here for two weeks would probably suffer some deprivation or some hardship He was asked these questions, he did not bring it up at the time that he was quizzed by Mr. Maxwell, nor while he was quizzed generically by myself So I'm not sure if we're not making a lot out of nothing here with Mr Prisock The jury has been struck, the composition is set and I feel it should remain that way unless further it's demonstrated

Secondly, with respect to Mr Maxwell's observation of Mr Prisock during the opening arguments of counsel, I missed the sleeping part during Mr Wilner's opening, but I did see Mr Prisock nodding, smiling in reaction to comments made by both counsel that he was paying attention All the jurors at one time or another that I saw, their eyes would close momentarily It's late in the day It's hot in this courtroom and it's after lunch But I didn't see any overt sleeping like I've seen in other cases that I've been involved in in this courtroom

So I don't doubt Mr Maxwell saw him

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nodding I don't doubt that everybody was nodding at one time here or another But to disqualify a juror --

THE COURT I was not nodding The record should reflect that

MR PRICHARD Absolutely, Your Honor And I retract that at risk of great harm to myself, Judge I must say, I was a little bit. But, in any event, Judge, if we start disqualifying jurors because they close their eyes a few minutes, we're never going to get a jury to render a decision in any case.

THE COURT Let me know the purpose of the in camera inquiry I am going to talk with Mr. Prisock I don't think the record is clear sufficiently for me to rule on whether or not this hardship is such that he should be excused And I do think it's an important question. But why, why in camera? Is it because you want to avoid the embarrassment to him of being brought out here by himself?

MR. PRICHARD Absolutely, Your Honor I think that would work.

MR. MAXWELL. Yes, Your Honor.

MR PRICHARD Agree with that?

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MR. MAXWELL Yes
MR. PRICHARD I'd like to have — doesn't have to be in camera with Mr Ford to perhaps hear from his mouth as best he can his recollection of Mr Prisock's comments That might cure it
THE COURT All right Let me do this. I'm going to ask Mr Prisock to remain for a moment We'll probably adjourn to chambers and perhaps I'll give both of you an opportunity to talk with Mr Ford and Mr Prisock at that time
With regard to tomorrow, is 9 00 a m a satisfactory time to begin?
MR MAXWELL Yes, Your Honor
MR WILNER Yes, Your Honor
MR PRICHARD Yes, Your Honor.
THE COURT Okay Is there anything else that I need to take up before I excuse the balance of the jurors?
MR MAXWELL Your Honor, would you like to take up the issues of the objections that we need to complete today or tomorrow morning?
THE COURT Perhaps in chambers As I recall, your estimate was —
MR MAXWELL Very brief

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THE COURT -- it would be ten or so minutes
MR WILNER Your Honor, we just have a short housekeeping matter Any x-rays that are Mr Carter's, you make sure you have them in the morning here, if you have them
MR SHEFFLER We have them What x-rays do you need?
MR. WILNER I need Mr Carter's x-rays
MR SHEFFLER All of them? The whole set?
MR WILNER Yeah, just want to make sure for housekeeping, if you have them
MR. SHEFFLER Yes
MR. WILNER. Okay.
THE COURT With that, would you bring the jurors back in, Mr. Ford.
(Jury present)
THE COURT Ladies and Gentlemen, you don't need to take the box I'm about to excuse you. I just wanted to let you know a time that we'll be returning tomorrow, which will be nine a.m. I hope that you will collect yourselves in the jury room a little bit before that with the hope that we can get started on time tomorrow

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morning So with that, if you'd tender your badges.
They do turn the badges over to you; don't they, Mr Ford? To Mr. Ford. I hope you have a restful evening
Mr. Prisock, I need for you to remain for just a moment I need to take up a matter with you, if you could
MR PRISOCK. Yes, sir.
THE COURT Okay
THE BAILIFF All of you except Mr Prisock are free to go out. I have the badges
THE COURT Mr Ford, if you could, please escort Mr Prisock to my chambers and the attorneys are going to meet me around there in just a moment I need you-all to remain for just a minute before you leave, though
I'd like to get your input, gentlemen, along with Mr Croll, about placement of that camera tomorrow
MR WILNER I don't think it will be in the way there I mean, I guess — I don't think that will particularly interfere with anything I have to do

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MR PRICHARD He's talking about shooting the witnesses tomorrow; right? I mean —
MR WILNER Whether he should? Yeah I don't have a position, Your Honor Hasn't bothered me so far and I just don't have a position one way or the other
MR PRICHARD Maybe I misunderstood. Was it your intention to move the camera to a different location so you could look —
MR CROLL Perhaps I may not be here tomorrow, so I really don't know. But just making an assumption, if it were myself, I would certainly move the camera to the other end of the courtroom because if there are witnesses to be heard, I would want to be pointing this direction
THE COURT Well, actually, I think that that position, as far as witness testimony is concerned, is distracting. It is too close to the witness.
MR. WILNER. Maybe so.
THE COURT So my suggestion would be somewhere behind the bar, actually.
MR. CROLL Well, I think that would probably work just fine for either myself or whomever would be doing it.

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MR WILNER. Fine. Be fine with us, Your Honor.
MR. PRICHARD We have the same problem, Your Honor. If he's back over here, he's shooting across the whole courtroom, can't see the witness If he's back over there, he's panning the jury, even though he's got a focus situation. I mean, if he can demonstrate that he can get in a position where he can see it and it doesn't interfere with Your Honor's orders, I've got no problem with him being in the back
THE COURT Well, who is going to be here tomorrow, Mr Croll?
MR CROLL I don't know
THE COURT Someone from your company?
MR CROLL It may be myself or they are possibly contracting with another company to get a satellite truck in to go live with this
THE COURT Well, we're going to start court at 9 00 And if the placement of the camera has not been approved by me by then, it will not be permitted You need to communicate that to whomever you're in touch with
MR CROLL By what time? Sorry, Your Honor

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THE COURT We're starting court at 9 00 If the placement of the camera is not approved by me before then, it will not be permitted, all right?
MR CROLL Yes
THE COURT Anything else, gentlemen?
MR CROLL Excuse me
THE COURT Mr Croll, you've got a question?
MR CROLL Excuse me just for a moment. What are the parameters that the gentlemen require in order to --
THE COURT Well, I'm not going to permit you to have the camera where it is tomorrow You can't tell me where you wish to have it placed tomorrow It needs to be approved before it's placed. If it's not approved before it's placed, it won't be permitted
MR. CROLL In the rear of the courtroom on the right-hand side, on your right. Anywhere in the rear would be probably fine
THE COURT. Any objections to that?
MR. PRICHARD Your Honor, I can't visualize. Does that take the jury out of the equation? That's all I'm worried about.

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MR. CROLL Yes, it would.
THE COURT With the representation that that placement will take the jury out of the camera's line of vision, or at least preclude them from being filmed, I don't have a problem with it being unobtrusively set up behind the bar on that side of the courtroom. Mr Sheffler, you need to have --
MR SHEFFLER. I just have one question, Your Honor If we're to cross-examine, I mean, there's not a lot of -- to look at the witness, I mean, without getting the camera moved over so he sees the jury, I don't know how he's going to get a shot, if we're cross-examining or direct examining I don't know anything about camera techniques, but --
THE COURT Nor do I, but I'm going to expect a demonstration or at least some assurances to be made concerning --
MR CROLL Well, if we put the camera on that side of the courtroom, in order to get whoever is questioning the witness, the shot would entail probably getting a juror or two in the --
MR SHEFFLER My point is that if you're shooting this way, and somebody is standing

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here, you're going to get their back
MR CROLL Well, you know, you can't -- if you want to choreograph everything, that's fine But, I mean, that's --
MR SHEFFLER I mean, what I'm saying is I would think whoever is doing the examination is going to want to look at the witness He's going to want to stand somewhere here and you --
MR. CROLL Based on the limitations of the courtroom and what you have to work with, I cannot be getting the jury in, then I would have to move the camera over this way and compromise that way.
MR. WILNER Or maybe we'll just shoot the questioner
MR SHEFFLER. I'm not talking about shooting the questioner. You're going to have to get his back. Because if you're shooting the witness, the questioner is in the line of camera, you're going to get his back.
MR. CROLL At some point in time obviously the camera person is obviously going to have to get footage of the attorney asking questions, so --
MR. SHEFFLER I don't think you're --

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we're not communicating.
MR. CROLL Okay.
MR. WILNER. Your Honor, I propose that we -- it seems to not have been a terrible distraction, at least it wasn't to me If it was to Your Honor I apologize, but I don't care in terms of whether there is a camera here or not But it seems to me we ought to, on the basis of the assurances that they are going to follow your orders, instruction -- I don't know the details, but if they don't get good shots, I guess that's their problem, as long as they don't interfere with the proceedings So if their -- it seems to me as long as they are willing to go back there If they don't get good shots, they don't get good shots. So, so what?
THE COURT All right Well, Mr Croll, I'll be in chambers by 8 30 tomorrow morning You need to direct whomever is going to be responsible for the placement of that camera to meet me there and be prepared to demonstrate the unobtrusiveness of the camera in this courtroom, including the limitations of the jury not being filmed
MR CROLL All right
THE COURT Request that I will see

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counsel in chambers
(Change of reporters)

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counsel in chambers
(Change of reporters)
- - -
(In chambers with Mr Maxwell, Mr Cronin, Mr Prichard, Mr Parrish, Mr. Bezanson, Mr Forte, Juror Prisock present at 5·15 p m)
THE COURT Okay, let me begin by saying, Mr Prisock, you're not in any trouble That's not why I've asked you to come back here It came to my attention through the bailiff, Mr Forte, that you had expressed some concern about the economic hardship that was -- that would be caused by your participation in this trial
MR PRISOCK Yes, sir
THE COURT Do you want to tell me about that
MR PRISOCK I'm in the landscape industry And after, of course, I was selected today, I went down and called my employer to let him know that I was in fact selected on the jury He said that he didn't know that he would be able to pay me while I was sitting in on the jury And the way I see it, $30 a day definitely would give me a financial hardship, you know, compared to what my normal salary is

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THE COURT All right There is no requirement under Florida law that your employer pay you for your jury service, or, for that matter, any other person who serves on a jury
MR PRISOCK I understand that
THE COURT It is a hardship for all of the persons that are selected to serve, particularly in a trial of this length You cannot be -- well, let me put it this way It is a violation of Florida law to terminate your employment because of your service on the jury You don't anticipate that that's --
MR PRISOCK No, sir, I don't feel that's the problem
THE COURT Was it only after you contacted your employer today that you became aware that this might be a problem for you?
MR PRISOCK Yes, sir
THE COURT Well, with that background then I'm going to allow either of the attorneys for the parties to inquire of you if they so choose I do understand that it's a hardship for you according to your representations here today Mr. Prichard or Mr Maxwell, do you have any questions?
MR. MAXWELL Mr. Prisock, you're not

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going to make as much money serving on the jury as you would working; is that right?
MR. PRISOCK. Correct.
MR MAXWELL What is the difference, do you know?
MR PRISOCK Probably about $50 a day
MR MAXWELL Thank you, that is all I have
MR PRICHARD I have a question Is it clear that your employer, is he just singling you out or has he done this before? Is it his policy or do you know?
MR PRISOCK. I don't believe he's ever had anybody serve on a jury that worked for him And since I, you know, was selected and I called him and told him -- when I first got my summons, I talked to him He said, well, I think we can pay you He thought it was going to be a one-day thing, so there was no problem Then when I called him back this afternoon to tell him that I had been in fact selected for the jury, he said, well, I don't know if I'm going to be able to pay you or not And that would be pretty hard for me
MR PRICHARD Sure, I understand I just wondered, you receive pay for being a juror, $30 a

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day, whatever the amount is, if you would consider asking him if you gave him your jury pay if he'd give you your regular pay In other words, so you're not collecting two paychecks, but so that the net difference would come from him
MR PRISOCK That's not the only problem See, this is our peak session also, being the landscape industry And he told me he couldn't do without me for two weeks
MR PRICHARD I guess one thing that had us all kind of curious -- I hope I'm not speaking out of school, but when we asked -- these questions were asked of everybody, and yourself included, whether it would be a hardship to sit through a two-week trial, I'm not sure maybe you heard us ask you that or we heard your answer, but I don't think it came up.
MR PRISOCK I never anticipated being selected, actually.
MR PRICHARD You just thought you would slide through?
MR. PRISOCK. Right, that's kind of the way I figured it.
MR PRICHARD No one here, of course, wants to work any personal imposition on you, and I

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hope you understand that On the other hand, I think we went through a long process to get down to the select jurors that were in the case at great amount of time and expense for all concerned, the Court's time and the others

I would ask if it's -- obviously if it's so great a hardship that you feel that you can't serve fairly as you had indicated you would to all concerned that we'd have to take that into consideration, I'm sure, but we symphathize with you because it's a tough position to be put in

I don't know what else to say, Judge It's a dilemma without a solution

THE COURT Well, I'll ask the critical question, since there's a reluctance on both sides on your parts Is this hardship you're going to experience, Mr Prisock, which I regret I echo counsel's comments that it is one that is nondiscriminatory in the sense it's going to be suffered by everyone who serves on the jury and is also unavoidable

But is that hardship to you going to be such that you do not believe you can sit and listen to the evidence in this case and fairly and impartially judge it as you are required to do by

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your oath?

MR PRISOCK No, I feel like I can still do the job

MR PRICHARD Your Honor, unless someone else has something to offer, could we possibly ask Mr Prisock to step outside so we can bring up a matter with the Court?

THE COURT Certainly Mr Prisock, if you don't mind Don't leave though

MR. PRISOCK Okay

(Mr Prisock exits)

MR. PRICHARD May we go off the record, Your Honor?

THE COURT Yes

(Discussion off record)

THE COURT Based on discussions with Mr Prisock on the record and some off-the-record discussions with counsel about the idea of possibly compensating Mr Prisock from some common fund, I've decided to allow them and me some additional time to consider a proper ruling on this case

I'm going to require Mr Prisock to return in the morning I'll revisit the issue then I think the record now, however, is such that there is not cause to strike him And the question really is

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whether or not the court order parties should try to devise a means of lessening the hardship And we'll revisit that question in the morning You-all want to add anything else to the record?

MR PRICHARD No, Your Honor

MR MAXWELL No, Your Honor.

THE COURT Mr Forte, would you ask Mr Prisock to come back in, please

(Mr Prisock enters)

THE COURT Mr Prisock, I'm not going to be able to excuse you from your jury service I'm sorry that it is such that it will work a hardship on you I appreciate your candor in telling me that and the parties that despite the hardship you believe you can be fair, because that's the most fundamental issue for these proceedings

I'm going to continue to give the matter some thought, however And I'll require that you return with the other jury members tomorrow morning at 9 00

MR PRISOCK Yes, sir, I'll be here

THE COURT Thank you very much, sir

MR PRICHARD Perhaps maybe you could talk your boss into it between now and then

MR PRISOCK I don't know He's pretty

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much of a stickler, but I'll try Thank you, gentlemen

THE COURT Mr Forte, I don't need you any longer, sir I just wanted you to be present

MR FORTE May I ask a question? The courtroom itself, there looks like there's a lot of stuff collecting in there Do you want me to lock it up, Judge, so the cleaners won't get in or will you be taking that out?

MR PRICHARD Don't lock it up yet. Overnight, once the exhibits are in, I think we'll all want it secured because we don't want to haul all that stuff back and forth.

MR FORTE Will you be going back after you adjourn?

MR. PRICHARD Yes, sir

THE COURT All right. We are returning to, as I recall, the defendant's objections to the testimony of -- deposition testimony of Robert Heimann. I believe I last ruled on and heard argument on page 54, line 19 through 25, but I'll --

MR MAXWELL You took that under advisement.

THE COURT. Took that one under advisement.

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MR MAXWELL That takes us to the top of page four --

MR PARRISH Just to make it clear, I think it was through 56, line 11 -- line 16 is what I have.

THE COURT Page 54, lines 19 through 25, page 55, lines 2 through 20 and 25; page 56, lines 2 through 16

MR PARRISH I believe that was all under advisement

THE COURT And upon consideration, I'm going to overrule your objection to those lines and that proffer

MR MAXWELL And if I can just interrupt you here, maybe I can speed this along Judge, on page four of the objections, page 57, lines 3 through 15, we will agree to delete that from the transcript

THE COURT All right

MR MAXWELL Okay, page 74, lines 20 through 25 -- well, I tell you what, let me just tell you which ones we will delete, then we can focus on the ones that are left

THE COURT Very good

MR MAXWELL Page 85 --

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THE COURT Did you skip 74?

MR MAXWELL Yes, page 74 and 75 I'd like to come back to Page 85, lines 20 through 25 --

MR PARRISH Pardon me, Greg You threw me there with the skip

MR MAXWELL Page 85, lines 20 through 25, page 86, lines 2 through 13, we will agree to delete

MR PARRISH One more time, I'm sorry

MR MAXWELL Page 85, lines 20 through 25, and then page 86, lines 2 through 13 It appears on page four of your objections We will agree to delete that from the video

And then the next item, page 86, lines 18 through 25, we will agree to delete that from the video Skipping the next one, come back to page 91, lines 6 through 25; page 92, lines 2 through 25, page 93, lines 2 through 5, we will agree to delete from the video.

And the bottom of page five, page 98, lines 19 through 25; page 99, lines 2 through 9, we will agree to delete. So that narrows it down a little bit, Your Honor.

THE COURT All right. Let's return then to page four of the written objections and begin

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with page 74, lines 20 through 25.

MR MAXWELL Yes, Your Honor. Basically, Judge, what this is, this is just some interjection here by Mr. Bezanson. You know, I think it's sort of part of the transcript, I guess he made that interjection to clarify the record, and I think what he did was -- I certainly don't have any problem with it. I think to pull that one little piece out makes the transcript choppy. I certainly don't think including that is in any way prejudicial I'm not really sure why it was objected to

MR BEZANSON The designated portion is the objection

MR MAXWELL Well, page 74, lines 20 through 25, where you say, Excuse me, can you tell us what you mean by consumer Another attorney said, A person that smokes Mr Bezanson said, A specific person? Mr. Davis, A user of the product And the question goes on

MR BEZANSON I think that I was trying to explore whether there was a foundation for objection to form as to asking for a legal conclusion

This was a consumer expectations case in a consumers expectation state And it occurred to me

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that the question was asked as calling for a legal conclusion that would be confused as a factual one I didn't want that to happen I don't think a lawyer objection or colloquy is appropriate This certainly wouldn't be read to a jury in the case in which it was taken

MR MAXWELL It may have been There's no objection here And it just flows It just makes it easier for the jury to follow the testimony

THE COURT Well, I'm concerned, Mr Maxwell, about the question on page 75, page five, Well, you lost me What is the question now that I am to answer?

MR MAXWELL Then he picks up

THE COURT Would you expect a consumer to rely upon your advertisements? Yes, our advertising is truthful and we anticipate that they would rely on it if they choose, certainly.

MR MAXWELL That part is not objected to, Your Honor

THE COURT But your point is that this clarifies it, and I'm not sure how it does. I'm going to sustain the objection to lines 20 through 25 on page 74. I think it is more confusing than

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clarifying Page 75, lines 3 through 4.
MR. MAXWELL That's the same part.
THE COURT Yes, I'm going to sustain that objection Let's move then to page 86, lines 18 through 25
I'm going the overrule the objection to page 86, lines 18 through 25, and page 87, lines 2 through 19, and page 88, lines 2 through -- give me just a minute I didn't look that far I'm going to overrule the objection to page 88, lines 2 through 22, as well
MR MAXWELL That takes us to what I think is the last one, page 95, lines 5 through 25
THE COURT All right, I'll hear any arguments you want to offer
MR PARRISH Your Honor, he clearly refers to Pall Malls, not Lucky Strikes, which is the product at issue in this suit It's certainly a warning read -- '72 warning, which is, of course, the date Grady Carter quit smoking our product What they might or might not do overseas is totally irrelevant This whole area is irrelevant and calls for speculation
Again they're asking Mr Heimann in 1986, long since retired by the company This is a not a

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30(b)6 deposition We don't have any documents which would bind the corporation
MR MAXWELL It's offered to show the jury what American's position was during times when Grady Carter smoked cigarettes The time period somewhat overlaps It's also offered to show that they have taken a position that is contrary to a number of other well-respected public health agencies
MR PARRISH Your Honor, not to be picky, but I would note, you asked the question -- some gentleman did, not Mr Maxwell Page 95 line 19, Would you put that warning there if Congress didn't require it?
What they would do in '86 is totally irrelevant. He didn't ask the question what American's position was nor did he ask the question what it was pre-1992. He asked Mr Heimann in 1986 what he would do that day That's not relevant to the issue as to anything Grady even said, and I don't agree with that.
MR MAXWELL That was their position in 1986
MR. PARRISH It doesn't ask that.
MR MAXWELL But there was a stipulation

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filed to that effect.
MR PARRISH I haven't seen it, and Mr Bezanson was there
MR BEZANSON I don't believe that was a fair characterization. I think the stipulation is much narrower than that
MR PARRISH I can show you -- I read carefully the front where they had a colloquy about whether it was a 30(b)(6) That was a subject of great discussion If you look at page four, line nine
MR MAXWELL Maybe I can narrow this down Here's what I will do I will agree to delete from page 95, line 5 to page 95, line 21 And I think that takes care of that objection
MR PARRISH Pardon me, Greg, you'll go down to 21 on 95, right?
MR MAXWELL Yes, then it picks up, the next question then would be that I would want to keep in would be page 95, line 22, to page 95, line 25, and then continuing on page 96 and 97
I want to delete that one section where it refers to Pall Mall and refers to the surgeon general's warning I think the other testimony is certainly relevant to show what their position is

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with respect to whether it is necessary to warn of their product and if their product is not injurious to health and that they disagree with the surgeon general In fact they say he's dead wrong I think the jury should hear that
THE COURT By stipulation, page 95, lines 5 through 21 have been withdrawn or will be deleted from the deposition testimony I'm going to overrule the objection to page 95, lines 22 through 25, page 96, lines 2 through 25, page 97, lines 2 through 21.
MR MAXWELL I think that concludes our session
Bob, here's what I will do I will fax you the revised parts, and then I'll have the videotape edited, and I'll make a copy for you
MR PARRISH Okay, and we'll just take a quick look at it.
Can I create a record that I'm still waiting for the documents that I requested in my fax of Sunday the 21st. I'm not sure anybody is even trying to get those to me, but we still -- my paralegal would still like to have them so we can have in our possession all of the listed plaintiffs' trial exhibits. And I'd like a response, Judge, if

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I could for the record.

MR MAXWELL I will check on that, Bob. I'm not -- I haven't been working on that problem, but I will make an inquiry

MR PARRISH Apparently nobody in the world cares about these exhibits but me, but that's been given to me as my job, so I'm trying to complete it

THE COURT You have a record

MR PARRISH If someone would just give them to me I will quit asking about them I may not quit talking about them, but I'll quit asking about the ones I don't have if I got them all

THE COURT I'll see you-all then at 9 00

MR PARRISH Thanks a lot

MR MAXWELL Thank you, Your Honor

(The proceedings were adjourned at 5 40 p m)

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COURT CERTIFICATE

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

The following individually named reporters certify that we were authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of our stenographic notes

We further certify the original transcript herein will be delivered to J W Prichard, Jr , Esq , attorney for defendant, for filing with the court or his safekeeping

DATED this 23rd day of July 1996

(Pages ___ through ___)
F Darlene Ricketson

(Pages ___ through ___)
Mary Kaminowski-Huth, RPR

(Pages ___ through ___)
Sandra Crowley, CSR, CM

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